STATEMENT OF THE CASE

Turner respectfully seeks review of a decision entered by the United States Court of Appeals for the Sixth Circuit. The basis for jurisdiction in the United States District Court for the Middle District of Tennessee was 28 U.S.C. § 1338 because this civil action arises under the copyright laws of the United States.

This case arises out of an interpleader action in which Broadcast Music, Inc. ("BMI"), a performing rights organization that collects royalties for performances of copyrighted musical works on behalf of authors and publishers, sought a declaratory judgment to determine what portion of the royalties for certain musical works written by Roger Miller ("Miller") shall be paid to Miller's heirs. Miller, a successful singer/songwriter who owned copyrights in many musical compositions, died testate on October 25, 1992. Turner is one of Miller's seven surviving children. Miller is also survived by his widow, Mary Arnold Miller. (*See* App. 47-48).

Many of Miller's copyrighted works entered their renewal term after Miller's death. Under Section 304 of the Copyright Act of 1976, renewal copyrights vest in the "widow, widower, or children, if the author is not living." 17 U.S.C. § 304(a)(1)(C)(ii). It is undisputed that Section 304(a) of the Copyright Act entitles Turner, as one of Miller's children, to an undivided interest in Miller's copyrights during their renewal term. The only issue is the percentage of Turner's interest in the renewal copyrights.

Turner's position is that the widow and each of the children share equally in the renewal copyrights. Roger Miller Music, Inc. ("RMMI"), the assignee of the shares of

Miller's widow and six other children, argues that the widow is entitled to fifty percent of Miller's renewal copyrights and the children share equally in the remaining fifty percent.

The District Court agreed with Turner, granting summary judgment in her favor and holding that Turner is entitled to a 12.5 percent, or one-eighth, interest in Miller's copyrighted works during their renewal term. (*See* App. 54, 57). RMMI filed a Rule 59(e) Motion to Alter or Amend the Judgment, and the District Court denied RMMI's motion. (*See* App. 59-60). RMMI appealed the District Court's decision.

The Sixth Circuit reversed the District Court's decision and held that, when the copyright to an author's work is renewed after the author's death and that author is survived by a spouse and children, the widow holds a fifty-percent share in the renewal copyright and the surviving children hold equal divided shares in the remaining fifty percent. The Sixth Circuit adopted the disproportionate allocation scheme of two other provisions of the Copyright Act, those addressing termination rights. (*See* App. 39-40). In reaching its decision, the Sixth Circuit disregarded this Court's opinion in *De Sylva*, 351 U.S. at 580, in which this Court found that the phrase "widow, widower, or children" found in the renewal provision in the previous copyright statute created a class of persons who "succeed to the right of renewal as a class, and are each entitled to share in the renewal copyright." (*See* App. 28-31).

Judge Daughtrey dissented on the basis that the plain meaning of the controlling statute, 17 U.S.C. § 304(a)(1)(C), devolves rights to the widow and the children without specifying disproportionate shares. (*See* App. 42-45).

The Sixth Circuit denied Miller's petition for panel rehearing and suggestion of rehearing *en banc* on April 1, 2005, noting that Judge Daughtrey would grant rehearing for the reasons stated in her Dissent. (*See* App. 1-2).

REASONS FOR GRANTING THE WRIT

I. The Sixth Circuit Departed from the Accepted and Usual Course of Judicial Proceedings by Improperly Injecting Meaning into the Copyright Act, Supplanting the Intent of Congress, and Misapplying Fundamental Rules of Statutory Construction.

The Sixth Circuit departed from the accepted and usual course of judicial proceedings by reading into the controlling statute an allocation scheme that Congress could have included but clearly chose not to include.

Section 304(a) of the Copyright Act provides that, for copyrighted works that were in their first twenty-eight-year term of statutory protection on January 1, 1978, the widow and children of a deceased author of such works are entitled to renewal copyrights in those works for a further term of sixty-seven years:

> (a) Copyrights in Their First Term on January 1, 1978. –
>
> (1)(A) Any copyright, the first term of which is subsisting on January 1, 1978, shall endure for 28 years from the date it was originally secured.
>
> ***

> (C) ***In the case of any other copyrighted work,*** including a contribution by an individual author to a periodical or to a cyclopedic or other composite work –
>
> (i) the author of such work, if the author is still living,
>
> (ii) ***the widow, widower, or children of the author, if the author is not living,***
>
> ***
>
> ***shall be entitled to a renewal and extension of the copyright in such work for a further term of 67 years.***

17 U.S.C. § 304(a)(1) (emphasis supplied).

The statute thus provides that the renewal rights of an author who died before the renewal rights vested are to be shared by the widow and the children. The statute contains no express language that the widow and the children are to share these rights disproportionately.[1] Therefore, the statute is not ambiguous, but creates a class of persons who are each entitled to proportional shares in the renewal of the copyright. *See De Sylva*, 351 U.S. at 580.

The Sixth Circuit improperly considered the absence of express language in the statute that the renewal rights should

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[1] Indeed, the Copyright Act provides that copyright co-owners share equal undivided interests in the copyright unless, by written agreement, they have allocated their ownership interest otherwise. *See* 17 U.S.C. §§ 201 (a), (d), 204.

be shared disproportionately as ambiguity and grounds to consider the Copyright Act as a whole for instruction on the intent of Congress on how to allocate the renewal rights. The Sixth Circuit determined that two provisions of the Copyright Act addressing a right separate and distinct from the renewal right – the right of termination – "represent the best indication of congressional intent with respect to how renewal copyright interests should vest between a deceased author's surviving spouse and children *upon creation*." (*See* App. 16-28) (emphasis in original). The Sixth Circuit reasoned that the termination provisions "are the only provisions in the Copyright Act that explicitly provide for how a deceased author's surviving spouse and children shall share renewal copyright interests, albeit termination." (*See* App. 21).

In applying the allocation scheme from separate and distinct sections of the Copyright Act, the Sixth Circuit ignored the plain meaning of Section 304(a) and injected new meaning into the renewal statute that was not intended by Congress.

Sections 304(c) and 203(a) provide for the termination of the conveyance of an interest in a copyright. Section 304(c) addresses termination in the context of renewal, providing, in the event an author is deceased, for his termination rights to be exercised by his heirs disproportionately: fifty percent by the widow and the remaining fifty percent to be divided by the surviving children. 17 U.S.C. § 304(c)(1). Section 203(a) provides for a similar termination of transfers of any copyright interest executed on or after January 1, 1978. As with Section 304(c), the termination interest under Section 203(a) is allocated fifty percent to the widow, with the remainder to be divided among any surviving children in equal shares. 17 U.S.C. § 203(a)(2)(A)-(B).

The Sixth Circuit ignored fundamental rules of statutory construction in applying to renewal rights the allocation scheme of the termination provisions. First, if the language of a statute is clear, a court must give effect to this plain meaning. *See Barnhart v. Sigmon Coal, Inc.*, 534 U.S. 438, 451, 122 S. Ct. 941, 151 L. Ed. 2d 556 (1985). The Sixth Circuit strained the meaning of the statute to find a disproportionate allocation scheme that simply is not present.

Second, the Sixth Circuit ignored the rule that "inclusion in one part of a congressional scheme of that which is excluded in another reflects a congressional intent that the exclusion was not inadvertent." *See Lynch v. Johns-Manville Sales Corp.*, 710 F.2d 1194, 1197-98 (6th Cir. 1983) (quoting *Equal Employment Opportunity Commission v. Kimberly Clark Corp.*, 511 F.2d 1352, 1362 (6th Cir. 1975), cert. denied, 423 U.S. 994, 96 S. Ct. 420, 46 L. Ed. 2d 368 (1975)). As the Sixth Circuit recognized, the renewal provision, Section 304(a), "is a re-codification of the prior renewal provision, which was initially at 17 U.S.C. § 24 (1909)."[2] (*See* App. 25, n.10 (citing H.R. No. 94-1476)). In re-codifying the renewal provision from the 1909 Copyright Act as part of the 1976 Act, the drafters clearly and specifically chose not to amend the provision to specify a disproportionate allocation procedure. At the same time Congress re-codified the renewal provision, it added the

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[2] Indeed, as the District Court observed, the renewal term harkens back to the original Copyright Act of 1790 and was extended to the author's surviving widow and children in 1831. (*See* App. 49-50 (citing Act of May 31, 1790, 1 Stat. 124, Act of Feb. 3, 1831, 4 Stat. 436)). The language relevant to this Petition, "widow, [widower], or children," was first used in 1870. *Id.* (citing Act of July 8, 1870, 16 Stat. 212).

termination provisions, including a disproportionate allocation scheme within the specific text of both provisions.

As the District Court noted, if Congress intended for copyright interests to vest identically under each provision, it could have explicitly added such language to Section 304(a) when it adopted Section 304(c). (*See* App. 53). Judge Daughtrey, in dissenting to the Sixth Circuit decision, agreed: "Congress certainly knew how to create a disproportional distribution scheme, as evidenced by the provisions in Section 304(c). That it did not employ similar language in Section 304(a) can only mean that it did not intend that section to mandate disproportionality." (*See* App. 43).

There is no question that Congress carefully considered the renewal provision in drafting the 1976 Copyright Act, when the termination provisions were added. Congress specifically addressed "problems and uncertainties that have arisen under the present renewal section" by defining the terms "widow," "widower" and "children" in the generally applicable definition section of the Copyright Act. 17 U.S.C. § 203, Comments. That Congress did not similarly amend the renewal section, Section 304(a), to include a disproportionate allocation scheme despite specifically adding such a scheme in both termination provisions suggests it did not intend for the renewal provisions to include a disproportionate scheme.

Indeed, Congress implicitly refused to adopt in the renewal provisions the disproportionate scheme set forth in the termination provisions, stating in the statutory notes attached to Section 304 that "it is not clear how the shares of a class of renewal beneficiaries are to be divided under

existing law . . . ."[3] 17 U.S.C. § 304, Comments; *see Venegas-Hernandez*, 283 F. Supp. 2d at 504 (citing *Nimmer on Copyright* at 9.04[A][1]n.6).

Further, the fact that Congress expressed a specific allocation scheme in subsection "c" of section 304, which follows subsection "a," indicates that the allocation scheme in "c" was intended to be a change from the allocation that had been previously established in subsection "a" of the same section. It was thus necessary to specify a new and different standard of allocation in subsection "c."

As the District Court noted, the relevant language in Section 304(a), "widow, widower, or children," has not changed substantively since 1870. (App. 49-50 (citing Act of July 8, 1870, 16 Stat. 212)). If Congress intended that the allocation of the renewal rights mirror the allocation of termination rights, then Congress could have drafted and/or revised Section 304(a) to provide for a similar allocation.

The Sixth Circuit refused to employ these rules of statutory construction, relying instead on the rule espoused by this Court in *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 110 S. Ct. 2668, 110 L. Ed. 2d 579 (1990). There, this Court declined to attach any significance to the

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[3] The Sixth Circuit rejected this argument, stating that "such an interpretation would not be entitled to any special deference because the law then in effect was adopted in 1909." As the Sixth Circuit recognized in the same opinion, however, the renewal provision in effect under the 1909 Act was re-codified in the 1976 Act to preserve the old law. (*See* App. 25, n.10 (citing H.R. No. 94-1476)). Therefore, the old reference by Congress to the state of the law at the time it amended the 1976 Act is highly relevant to its intent with respect to the renewal provision.

failure of Congress to enact a proposed amendment to prior enacted legislation. As Judge Daughtrey observed in her Dissenting Opinion in this case, *Pension Benefit* is distinguishable:

> The failure of Congress to enact a proposed amendment in *Pension Benefit* is simply not the equivalent of the legislative history in this case, in which Congress did amend an existing section of the statute, namely § 304(c), to create a distinction that it did not extend to the statutory provision here, § 304(a).

(*See* App. 44).

Congress had ample opportunity to amend Section 304(a). It never did so. The Sixth Circuit's adoption of an entirely new allocation scheme to this provision ignores the rules of statutory construction established by this Court, adds a term to a silent statute without justification and supplants the intent of Congress.

The Sixth Circuit's application of the disproportionate allocation scheme of the termination provisions departed from the usual course of judicial proceedings in another sense: The termination and renewal interests are separate and distinct rights. As the District Court opined: "That Congress chose not to add similar language to Sec. 304(a) suggests that Congress did not consider the rights granted under the two provisions to be substantially the same." (App. 53).

The disproportionate allocation scheme of the termination provisions was created for reasons unique to termination rights. Termination rights involve more than just the allocation of copyright interest; they also involve the

allocation of the right to decide to terminate. That is not the case in the renewal context. As the drafters explained in the Comments to Section 203:

> Two issues emerged from the disputes over section 203 as to the persons empowered to terminate a grant: (1) the specific classes of beneficiaries in the case of joint works; and (2) ***whether anything less than unanimous consent of all those entitled to terminate should be required to make a termination effective. . . .The bill to some extent reflects a compromise on these points, including a recognition of the dangers of one or more beneficiaries being induced to "hold out" and of unknown children or grandchildren being discovered later.***

17 U.S.C. § 203, Comments (emphasis supplied).

Equal shares of the right to determine whether to terminate could create a virtual deadlock among the heirs in determining whether to terminate a transfer. The District Court noted this "significant difference" between Sections 304(a) and (c):

> [T]he termination interest can only be exercised by class members who together own a total of more than one-half of the author's termination interest. Sec. 304(c)(1). Vesting 50% of the termination interest in one of the class members gives that member leverage to effectuate a termination by needing the assent of only one more class member. In contrast, the renewal right may be exercised by any member of the renewal

> class; once exercised, the benefit enures to every class member. *See Nimmer on Copyright*, § 9.05[C][2].[4]

(*See* App. 53). The disproportionate allocation scheme in the termination provisions is logical, based on the decision-making power granted as part of the termination right. The renewal right is a passive right that requires no affirmative action by the heirs.

The Sixth Circuit's decision to supplant the plain meaning of the renewal provision with a disproportionate allocation scheme that was clearly derived for purposes unrelated to renewal considerations supplants the intent of Congress and ignores fundamental rules of statutory construction. In rendering its decision, the Sixth Circuit departed from the accepted and usual course of judicial proceedings, calling for the exercise of this Court's supervisory powers.

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[4] The Sixth Circuit observed that a renewal copyright automatically vests and does not need to be exercised. (*See* App. 24). This point underscores the distinction between the termination and renewal recapture provisions. The heirs to the termination right not only must affirmatively exercise the right, they must do so by agreement. An equal allocation would make this much more difficult.

II. The Sixth Circuit Decision Conflicts with Not Only the District Court Opinion and the Dissenting Opinion but also Principles Established Previously by this Court and the Opinions of the Register of Copyrights, the Preeminent Treatise on Copyright Law and the Only Other Published Legal Opinion on This Important Copyright Issue.

The issue of how a deceased author's renewal copyrights are to be allocated among his or her heirs is, as the District Court recently observed, "novel" and "extremely important to all of the holders of copyrights." (*See* App. 67).

> What the Second Circuit said in 1963 is equally applicable today to the question at hand: "This action . . . presents us with a picture all too familiar in copyright litigation: a legal problem vexing in its difficulty, a dearth of squarely applicable precedents, a business setting so common that the dearth of precedents seems inexplicable, and an almost complete absence of guidance from the terms of the Copyright Act."

(App. 51, n.2 (quoting *Shapiro, Bernstein & Co., Inc. v. H. L. Green Co., Inc.*, 316 F.2d 304, 305 (2d Cir. 1963)).

Granting *certiorari* in this case is particularly warranted because, as the Register of Copyrights recognized in a letter opinion on this issue, interpreting the statute to mean the deceased author's heirs take disproportionate shares could "interfere with current and past expectancies and presumably disrupt the estate planning of many authors." (*See* App. 80). This is particularly the case because every legal authority that has opined on the issue has determined that the plain language of the controlling statute is most reasonably read to mean that

the widow and the children share equally in the renewal rights.

This Court's decision in *De Sylva*, 351 U.S. at 580, although not controlling, "provides the foundation for deciding the issue presented." (*See* App. 52). It is a fundamental rule of statutory construction that Congress is presumed to be thoroughly familiar with Supreme Court precedent and that it expected its enactments to be interpreted in conformity therewith.[5] Although this Court has not ruled directly on the question of how to allocate the renewal rights to the heirs when the renewal provision of the 1909 Act was re-codified at Section 304(a) of the 1976 Act, this Court had held that the widow and the children of the author are to take the renewal rights as a class. *See De Sylva*, 351 U.S. at 580 (holding that, "on the death of the author, the widow and children of the author succeed to the right of renewal as a class, and are each entitled to share in the renewal term of the copyright") (emphasis supplied). As the District Court noted:

> If the members of the class are each entitled to share in the rights created, it follows logically that the class members will share equally of that right, absent any indication from Congress of a contrary intent.

(*See* App. 52).

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[5] *United States v. Landham*, 251 F.2d 1072, 1085 (6th Cir. 2001) (citing *Apollomedia Corp. v. Reno*, 19 F. Supp. 2d 1081, 1089-90, 1092 (N.D. Cal. 1998) (finding significance in the fact that this interpretation prevailed at the time the predecessor statute was enacted)).

Since *De Sylva* and before the re-codification of the renewal provision, other courts have indicated that the widow and the children should share the royalty income earned during the renewal term equally. *See, e.g.*, *Bartok v. Boosey & Hawkes, Inc.*, 523 F.2d 941, 943, n.2 (2d Cir. 1975) (stating that, during the statutory renewal period, the royalty income would presumably be paid in "equal shares" to the widow and the child); *Hill & Range Songs, Inc. v. Fred Rose Music, Inc.*, 403 F. Supp. 420, 423, 436 (M.D. Tenn. 1975) ("As [Hank Williams'] widow, she has the right to apply for the renewal of the copyrights in his music, to the extent of her one-half interest.").

The Sixth Circuit declined to consider *De Sylva* and its progeny, stating that, "even if *De Sylva* suggests that Congress's intent at the time appeared to be that spouses and children hold equal shares in renewal copyright interests, the subsequent enactment of § 203 and § 304(c) provides evidence of a more recent and contrary intent." (*See* App. 30).

The Sixth Circuit is simply incorrect. "[W]ithout explicit statutory instructions, the cases drawn upon by Congress in writing legislation are not supplanted by the legislation, and courts may – and indeed should – continue to look to these cases for guidance." *CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.2d 544, 553 (4th Cir. 2004). Moreover, Congress did not enact the termination provisions in a vacuum but added them at the same time it re-codified a renewal principle that had already been firmly in place for years. The intent of Congress, as confirmed in the comments to the re-codified renewal provision, was not to supplant the renewal provision but to preserve it. 17 U.S.C. § 304, Comments. Therefore, Congress can be presumed to have considered *De Sylva* and other case law when re-codifying the renewal right and adding

the new termination sections and, despite this case law, found no need to amend the renewal provision to specify disproportionate rights. Therefore, that case law is not supplanted and should have been considered.

The Sixth Circuit also rejected the persuasive analysis of the leading treatise on copyright law, *Nimmer on Copyright*:

> Because the [Copyright] Act fails to indicate any internal division for what has been established as a single class, it appears to be more logical to regard all members of the class – widow and children – alike, as equally sharing claimants.

Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* ("Nimmer"), § 9.04 at 9-30 (2001). The Sixth Circuit rejected this authority on the basis that it does not address the relationship between Section 304(a) and the termination provisions. In fact, the treatise properly disregarded this relationship, recognizing elsewhere in an extended discussion of termination rights that Congress made a deliberate decision to allocate the termination rights disproportionately because of the affirmative agreement of the heirs required to terminate a transfer:

> In the case of grants executed by renewal beneficiaries, if anything less than the unanimous approval of the beneficiaries were to be required, it would necessitate deciding whether a surviving spouse owns a one-half interest in the renewal (and is therefore entitled to a fifty percent voting interest in termination) or whether his or her interest is no greater than that of each of the surviving children. Because this issue was unclear under the 1909 Act, and remains unclear under the renewal provisions

> incorporated from the 1909 Act into the new Act, avoiding the question for termination purposes by requiring unanimous approval was thought prudent.

Nimmer, § 11.03[B] at 11-40.6.

The Sixth Circuit also rejected a September 11, 2003, letter opinion of the Register of Copyrights, which concluded that "the plain reading of § 304(a)(1)(C)(ii), coupled with a review of the scant case law and commentary, suggests that the proper interpretation is that there is a proportional division of renewal rights under § 304(a)." (*See* App. 73). The Register opined that "to read the current language as providing for a *per stirpes* division would be a very strained reading." (*See* App. 80). The Register recognized the disruption a *per stirpes* interpretation would have on authors, as it "would interfere with current and past expectancies and presumably disrupt the estate planning of many authors." (*See* App. 80).

Finally, the Sixth Circuit rejected the only opinion directly on point, *Venegas-Hernandez*, 283 F. Supp. 2d at 491. The court in *Venegas-Hernandez* declined to apply the termination provisions in the Copyright Act, choosing instead to apply an equitable distribution across the class:

> Section 304(c)(2) termination rights inhere in the family members of an author who grants a vested renewal right to a third party in the absence of a prior testament. If there has been a will, the copyright renewal transfers by testament, and the statutory class does not receive the termination rights. Thus a plain reading of the statute reveals that the termination

> provisions are meant to tackle factual circumstances materially different from the ones at hand.

Id. at 505.

The Sixth Circuit disregarded the plain meaning of the statute and the overwhelming authority supporting Turner's position: that a deceased author's copyright renewal interest should be shared equally by the heirs, and not disproportionately according to the scheme specifically carved out to accommodate the unique decision-making right granted by the termination provisions.

As the Register of Copyrights predicted, the practical effect of the Sixth Circuit's decision is to disrupt the current and past expectancies and estate planning of authors. (*See* App. 80). As recently reported in the *New York Law Journal*, respected music lawyer Thomas Levy explained, from a practitioner's perspective, the pervasiveness of this issue and the need for a consistent and final resolution:

> The problem of the division of renewal copyrights among the class of widow and children has vexed practitioners in the field of copyright law for many years. It seems astonishing that a legal issue which is of such long standing and is so pervasive, particularly, in the area of musical copyrights, has never been decided in spite of all invitations to the courts to do so.
>
> Because of the uncertainty of the statutory meaning, practitioners have been constrained to find compromises suitable to their clients' needs and desires in specific situations, often influenced by the client's economic power and by the value of the

> copyright(s) at issue. Such situations are common. I cannot remember a time when there was not at least one of my clients affected by the problem, either in the context of a family dispute of the type that brought the *Roger Miller* case to the courts or in the context of a dispute between publishers who could not be certain as to the percentage of a copyright which they might have been assigned by an author's widow or by one or more of an author's children.

Alan J. Hartnick, "Copyright: Can the Widow Take More than the Children?," *New York Law Journal*, June 20, 2005, http://www.nylj.com (quoting Thomas Levy). (*See* App. 89).

The issue presented is one of national importance because the Sixth Circuit's ruling threatens to disrupt the expectancies of all authors who created works governed by the copyright renewal provision. Turner respectfully requests that this Court grant her petition and reverse the decision below to restore authors' expectancies and the intent of Congress.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that this Court grant the Writ of Certiorari.

Respectfully submitted,

Jay S. Bowen
Counsel of Record
Amy J. Everhart
Bowen Riley Warnock & Jacobson, PLC
1906 West End Avenue
Nashville, Tennessee 37203
(615) 320-3700

Attorneys for Petitioner,
Shannon Miller Turner

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 02-5766

[Filed April 1, 2005]

BROADCAST MUSIC, INC., Plaintiff,	)
v.	)
ROGER MILLER MUSIC, INC., Defendant-Appellant,	)
SHANNON MILLER TURNER, Defendant-Appellee.	)

BEFORE: SILER, DAUGHTREY, and GIBBONS, Circuit Judge.

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote

on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Daughtrey would grant rehearing for the reasons stated in her dissent.

ENTERED BY ORDER OF THE COURT

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 02-5766

[Filed January 28, 2005]

BROADCAST MUSIC, INC., Plaintiff,

v.

ROGER MILLER MUSIC, INC., Defendant-Appellant,

SHANNON MILLER TURNER, Defendant-Appellee.

BEFORE: SILER, DAUGHTREY, and GIBBONS, Circuit Judges.

Appeal from the United States District Court
for the Middle District of Tennessee at Nashville
No. 01-00453
Todd J. Campbell, District Judge

OPINION

JULIA SMITH GIBBONS, Circuit Judge. Plaintiff Broadcast Music Inc. ("BMI") filed this interpleader action to determine what portion of the interpleaded funds it is required to pay to defendant-appellee Shannon Miller Turner and defendant-appellant Roger Miller Music, Inc. ("RMMI"). The interpleaded funds consist of royalties generated from BMI's licensing of certain songs written by country music legend Roger Miller. Turner, a daughter of Miller, is entitled to some of these royalties under the Copyright Act because the copyrights to the songs at issue were renewed after Miller died, vesting Turner with an interest in these copyrights pursuant to 17 U.S.C. § 304(a). The extent of Turner's interest in these copyrights depends on the magnitude of the interest formerly held by Mary Arnold Miller, Roger Miller's widow, who also obtained an interest in the renewal copyrights pursuant to § 304(a), and by Roger Miller's other surviving children, who likewise obtained interests in the renewal copyrights. Turner argued before the district court that Mary Arnold Miller and Roger Miller's seven children, herself included, all held equal shares in the renewed copyrights and that, therefore, she is entitled to 1/8 (12.5%) of the renewal copyright royalties. RMMI, to which Mary Arnold Miller and all of Roger Miller's children except Turner have assigned their renewal copyright interests, argued that Mary Arnold Miller obtained a fifty-percent interest in the renewal copyrights as Miller's surviving spouse and that Roger Miller's children held equal shares in the remaining fifty-percent of the renewal copyrights, or 7.14% each. The district court found that § 304(a) provides that the surviving spouse and children of an author who originally copyrighted a work share equally in that work's renewal copyright when that copyright is renewed after the author's death. RMMI appeals the judgment of the district court. For

the following reasons, we reverse the district court's grant of summary judgment for Turner, grant summary judgment for RMMI, and remand the case for distribution of the interpleaded funds.

I.

The facts in this case are undisputed. Roger Miller is a Grammy Award-winning legend of country music. Although Miller penned and performed many hit songs, he is most famous for the still-loved "King of the Road." Miller died on October 25, 1992. He is survived by his widow, Mary Arnold Miller, and seven children, including Turner.

This case concerns interests in the renewal copyrights of certain of Miller's works. A preliminary understanding of the renewal copyright scheme is necessary to appreciate the facts of the case. The Copyright Act provides that the copyright to any work copyrighted prior to January 1, 1978, endures for twenty-eight years from the date it was originally secured. 17 U.S.C. § 304(a)(1)(A). Once the twenty-eight year copyright period has expired, the copyright will be renewed for a term of sixty-seven years either by registration or, in the absence of registration, automatically. *Id.* § 304(a)(2)(B). If the copyright is renewed during the author's lifetime, the renewal copyright vests in the author. *Id.* § 304(a)(2)(B); 3 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 9.04 (2003) (hereinafter "*Nimmer on Copyright*"). If the author is deceased at the time of renewal but is survived by a spouse and/or children, the renewal copyright vests in the surviving spouse and/or children. 17 U.S.C. § 304(a)(2)(B); *see also Nimmer on Copyright* § 9.04[A]. The Copyright Act is silent, however, as to how the renewal copyright interest will be shared between an author's surviving spouse and children, which is the issue before us in this appeal.

Familiarity with some basics of the music industry is also crucial to understanding the nature of the dispute before the court. A person who writes a song often copyrights that song. The songwriter at that point owns 100% of that copyright. Generally, a songwriter assigns all of his interest in a copyrighted song to a music publisher. In return, the publisher agrees by contract to exploit the song on the market and to pay the writer royalties generated by such exploitation. Although arrangements vary by contract, the standard practice is that a publisher retains fifty-percent of the revenue generated by a song's exploitation (known as the publisher's share) and pays the other fifty-percent to the writer of the song (known as the writer's share).

Publishers, in turn, affiliate with performing rights organizations, which license the public performance rights of copyrighted musical compositions on behalf of their affiliates.[1] By affiliating with such an organization, the publisher grants the organization the ability to license the public performance of the songs to which the publisher holds the copyright. BMI and the American Society of Composers, Authors and Publishers ("ASCAP") are the two principal performing rights organizations operating in the United States. These organizations pay to their affiliates in the form of royalties a portion of the revenues generated from licensing the public performance of songs. When a publisher affiliates with one of these organizations, it agrees to adhere to the articles and bylaws of the organization, which generally provide that public performance royalties will be divided

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[1] Writers who do not transfer their copyright interest to a publisher may also affiliate with a performing rights organization. In such instances, the writer receives 100% of the royalties generated from the licensing of her song.

between the publisher and the writer irrespective of other financial arrangements made between the those two parties. Commonly, writers and publishers agree to be paid their respective shares of performing rights royalties directly by the performing rights organization.

After Roger Miller's death, the copyrights to numerous songs penned and copyrighted by him prior to 1978 were renewed on separate occasions pursuant to § 304(a).[2] These compositions are the subject of this dispute. Under § 304(a)(2)(B), these renewed copyrights vested in Mary Arnold Miller and Roger Miller's seven children. Mary

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[2] While it is not exactly clear from the record whether the copyrights at issue were renewed by registration or automatically upon expiration of the original copyright, it appears they were renewed by registration. As copyrights subject to 17 U.S.C. § 304, the original copyrights to all of Miller's songs at issue ran to the end of the calendar year in which they would have otherwise expired. *Id.* § 305. All of the renewal copyrights at issue were registered within one year of the end of the calendar year in which the original copyrights were to expire. Hence, it appears that the copyrights were renewed by registration without resort to the automatic renewal provisions. 17 U.S.C. § 304(a)(1)(C)(i). Consequently, the copyright renewal vested upon the beginning of the renewal term in all parties entitled to the renewal and extension at the time of the application, namely Mary Arnold Miller and Roger Miller's seven children. *Id.*

Also unclear from the record is who actually registered the renewed copyrights. If the registration of the renewed copyright for "Engine Engine Number Nine" is representative of the renewal of the other songs at issue, then Mary Arnold Miller registered the renewed copyrights as widow of Roger Miller.

Arnold Miller conveyed all of her renewal copyright interests[3] to RMMI.[4] Excepting Turner, all of Roger Miller's children also assigned their present and future renewal copyright interests to RMMI.

BMI collected royalties by licensing the songs at issue after the original copyright on each song expired and was subsequently renewed. BMI initially distributed these royalties to RMMI, a BMI affiliate. On February 2, 2001, Turner's attorney wrote BMI a letter requesting that the company pay Turner all royalties collected for the licensing of Miller's songs in which she held a renewal copyright interest commensurate with her interest in those songs. Turner claimed that she held a 12.5%, or 1/8, share in renewal copyrights and that she was thereby entitled to 12.5% of all royalties generated by the songs in which she held such an interest. RMMI disputed Turner's assertion that she owned a 12.5% share in any of the songs at issue. Thereafter, BMI withheld disputed royalties. In a letter to Turner's attorney written March 6, 2001, BMI suggested that the parties resolve the dispute amicably. The parties failed to do so.

In an effort to determine its obligations under federal law, BMI filed this interpleader action on May 18, 2001, in the United States District Court for the Middle District of Tennessee pursuant to 28 U.S.C. § 1335, seeking a declaratory judgment as to the entitlement of RMMI and

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[3] Roger Miller died testate and bequeathed to Mary Arnold Miller all the copyright interests held by him at death. In addition to her renewal copyright interests, Mary Arnold Miller also transferred these original copyright interests to RMMI.

[4] The sole shareholder, president, and CEO of RMMI is Mary Arnold Miller.

Turner to royalties generated from the licensing of Miller's songs. At the time of the complaint, the funds at issue amounted to $30,425.60. This sum represented 12.5% of the publisher's share of the royalties generated, or 6.25% of total royalties. On May 24, 2001, the district court ordered BMI to place those funds in an interest-bearing account. BMI complied with the order. RMMI filed a cross-claim against Turner on June 19, 2001. RMMI argued that Turner's claim for royalties was barred by laches and the three-year statute of limitations set forth in the Copyright Act at 17 U.S.C. § 507(b). Because its position was that Turner was entitled to 7.14% of the total royalties, RMMI did not dispute that Turner was entitled to the interpleaded funds; however, it asserted that she was not entitled to a full 12.5% of all royalties. In response, Turner filed a motion to dismiss the interpleader complaint on June 29, 2001. Turner asserted that the case should be dismissed since RMMI conceded that she was entitled to the interpleaded amount. However, after filing the interpleader complaint, BMI began withholding 12.5% of all royalties – both the writer's and publisher's share – generated from the public licensing of the songs at issue and notified the court that it intended to interplead these royalties in addition to the prior interpleaded funds, which consisted only of the publisher's share. The court ordered BMI to interplead these additional total royalties on August 1, 2001, and BMI again complied. As a result, the district court denied Turner's motion to dismiss, noting that – while the parties did not dispute that Turner was entitled to the funds initially interpleaded – the parties did dispute whether she was entitled to a full 12.5% of total royalties.

RMMI then filed a motion for summary judgment on October 4, 2001. RMMI argued that the Copyright Act provides that, when a copyright originally secured by an author prior to 1978 is renewed after the author's death, the

author's surviving spouse obtains a fifty-percent share in the renewed copyright, while the author's surviving children obtain equal shares in the remaining fifty-percent. RMMI also asserted that Turner's claim for royalties was barred by the statute of limitations set forth at 17 U.S.C. § 507(b) and by laches. Turner filed her own motion for summary judgment on October 5, 2001, arguing that an author's surviving spouse and children obtain equal shares in any copyright originally secured by the author prior to 1978 and renewed after the author's death. The district court found Turner's proffered interpretation of § 304(a) most persuasive and also determined that the statute of limitations and laches did not bar Turner from recovery. The district court therefore denied RMMI's motion for summary judgment and granted Turner's motion.

On April 22, 2002, RMMI filed a motion requesting that the district court alter or amend its judgment with respect to its disposal of RMMI's statute of limitations and laches claims. RMMI asserted that the court should have found that Turner was barred from recovering royalties from RMMI. The district court denied this motion on May 29, 2002.

RMMI filed a timely notice of appeal on June 6, 2002, appealing the district court's denial of its motion to alter or amend the judgment, the district court's denial of RMMI's motion for summary judgment, and the district court's grant of summary judgment for Turner.

II.

This court reviews a district court's grant of summary judgment *de novo*. *Little v. BP Exploration & Oil Co.*, 265 F.3d 357, 361 (6th Cir. 2001). Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the

affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Likewise, when a district court denies a motion filed pursuant to Fed.R. Civ. P. 59(e) to alter or amend a grant of summary judgment, we review the denial *de novo*. *Cockrel v. Shelby County Sch. Dist.*, 270 F.3d 1036, 1047 (6th Cir. 2001).

A. Renewal Copyright Interests

The principal issue in this case concerns the proper interpretation of the provisions of the Copyright Act dealing with the renewal of copyrights that originally existed on or prior to January 1, 1978. The Act provides that "[a]ny copyright, the first term of which is subsisting on January 1, 1978, shall endure for 28 years from the date it was originally secured." 17 U.S.C. § 304(a)(1)(A). Upon expiration, such copyrights are renewed for an extended term. Renewal schemes vary according to the nature of the work copyrighted. According to 17 U.S.C. § 304(a)(1)(B),

> [i]n the case of - (i) any posthumous work or of any periodical, cyclopedic, or other composite work upon which the copyright was originally secured by the proprietor thereof, or (ii) any work copyrighted by a corporate body . . . or by an employer for whom such work is made for hire, the proprietor of such copyright shall be entitled to a renewal and extension of the copyright in such work for the further term of 67 years.

The copyrights for all other works are renewed under another scheme. Under this alternate scheme, "(i) the author of such work, if the author is still living, [or] (ii) the widow, widower, or children of the author, if the author is not living,

. . . shall be entitled to a renewal and extension of the copyright in such work for a further term of 67 years." § 304(a)(1)(C). Although the disjunctive language in § 304(a)(1)(C) suggests that either a deceased author's surviving spouse or his children, but not both, have interests in a renewal copyright created after the author's death, Congress has made clear that an author's surviving spouse and children may simultaneously obtain shares in a renewed copyright. The Act states that, when a copyright is renewed pursuant to § 304(a)(1)(C),

> the copyright shall endure for a renewed and extended further term of 67 years, which – (i) if an application to register a claim to such further term has been made to the Copyright Office within 1 year before the expiration of the original term of copyright, and the claim is registered, *shall vest,* upon the beginning of such further term, *in any person who is entitled under paragraph (1)(C) to the renewal and extension of the copyright at the time the application is made*; or (ii) if no such application is made or the claim pursuant to such application is not registered, *shall vest,* upon the beginning of such further term, *in any person entitled under paragraph (1)(C), as of the last day of the original term of copyright, to the renewal and extension of the copyright*.

§ 304(a)(2)(B) (emphasis added). By providing that copyright interests will vest in *any person* entitled to renew and extend the copyright under § 304(a)(1)(C), § 304(a)(2)(B) necessarily provides that renewal copyright interests can be held

simultaneously by numerous parties.[5] As surviving spouses and children are entitled to renew and extend copyrights when an author is deceased, *id.* § 304(a)(1)(C), it is clear that an author's children and an author's surviving spouse may simultaneously hold ownership interests in renewed copyrights if the author is deceased at the time of renewal. *Id.* § 304(a)(2)(B); *see also DeSylva v. Ballentine*, 351 U.S. 570, 76 S. Ct. 974, 100 L. Ed. 1415 (1956) (construing the Copyright Act prior to the adoption of § 304(a)(2)(B) and holding that an author's surviving spouse and children are each entitled to shares in a copyright renewed after the author's death). What is unclear from the statute, however, is the exact proportion of the renewal interest that vests in each eligible party.[6]

The Supreme Court has clarified certain other aspects of these renewal provisions. In *Fisher Music Co. v. W. Witmark & Sons*, 318 U.S. 643, 63 S. Ct. 773, 87 L. Ed. 1055 (1943), the Court held that an author can assign renewal copyright

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[5] We note as well that § 304(a)(2)(B)(ii) provides that copyrights will renew automatically and vest in eligible parties upon renewal even absent formal registration by an eligible party.

[6] The dissent says that it is relying on the plain language of the statute and that the majority opinion's conclusion as to its proper interpretation is a "clear act of judicial activism." Both the reference to the statutory language and the charge of activism are puzzling. The statute does not address the issue of the exact proportion of the renewal interest that vests in each eligible party. Thus the dissent's interpretation is in no way based on the plain language of the statute. Nor can the majority's interpretation properly be described as activist. This case requires us to decide the issue of proportionate interest, an issue about which the statute is ambiguous. A reasoned selection of one of two possible interpretations is simply a resolution of the case, not activism.

interests in his works prior to their vesting at the end of an original copyright term and that he is bound by such an assignment if the renewal copyright vests in him prior to his death. *Id.* at 658-59. For instance, an author can assign both his original and renewal copyright interests at once, even though the renewal copyright has not yet begun, and the author is bound by the assignment if the renewal copyright begins during his life.

In *Miller Music Corp. v. Charles N. Daniels, Inc.*, 362 U.S. 373, 4 L. Ed. 2d 804, 80 S. Ct. 792 (1960), the Court held that the conveyance of a renewal copyright interest by an author prior to the vesting of that renewal copyright interest in him is a mere expectancy or contingency interest. Thus, if the author dies prior to the vesting of the renewal copyright, the party to whom the author conveyed the renewal copyright has no entitlement to that renewal copyright. *Id.* at 375. Rather, when the renewal copyright vests, it will vest in the spouse and children of the author, provided they are living, pursuant to the renewal provisions. *Id.* While the cases clarify certain aspects of the renewal copyright scheme, *Fisher Music* and *Miller Music* do not illuminate how renewal interests should be divided between an author's surviving spouse and children when the renewal copyright vests after the author's death.

RMMI argues for a "disproportionate shares" interpretation of § 304(a) providing that, when a copyright to a work is renewed after the death of the author of the work in question, the surviving spouse of the author obtains a fifty-percent undivided interest in the renewal copyright and that the author's surviving children take the remaining fifty-percent interest in the renewal copyright in equal shares. Turner argues for an "equal shares" interpretation of § 304(a) providing that the interests in copyrights renewed after the

death of an author are shared equally among the author's children and the author's surviving spouse. Finding no support in the statute or in its legislative history for the proposition that renewal copyright interests are shared disproportionately, the district court adopted the interpretation offered by Turner. RMMI appeals this determination. This court reviews a district court's statutory interpretations *de novo*. *United States v. Rapanos*, 339 F.3d 447, 450 (6th Cir. 2003).

When construing a legislative enactment, courts are to give effect to the intention of the legislature adopting the statute or provision in question. *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 409, 113 S. Ct. 2151, 124 L. Ed. 2d 368 (1993) (citing *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984)); *Hedgepeth v. Tennessee*, 215 F.3d 608, 616 (6th Cir. 2000) ("The primary rule of statutory construction is to ascertain and give effect to the legislative intent."). To determine legislative intent, a court must first look to the language of the statute itself. *Bd. of Ed. of Westside Cmty. Schs. v. Mergens*, 496 U.S. 226, 237, 110 S. Ct. 2356, 110 L. Ed. 2d 191 (1990); *Mills Music, Inc. v. Snyder*, 469 U.S. 153, 164, 105 S. Ct. 638, 83 L. Ed. 2d 556 (1985). If the language of the statute is clear, a court must give effect to this plain meaning. *See Barnhart v. Sigmon Coal, Inc.*, 534 U.S. 438, 451, 122 S. Ct. 941, 151 L. Ed. 2d 908 (2002). In discerning whether a statute offers a plain meaning, a court looks to the language and design of the statute as a whole. *United States v. Ninety-Three Firearms*, 330 F.3d 414, 420 (6th Cir. 2003). Courts are to make every effort to interpret provisions so that other provisions in the statute are not rendered inconsistent, superfluous, or meaningless. *Cafarelli v. Yancy*, 226 F.3d 492, 499 (6th Cir. 2000). If after such an analysis a statute's meaning remains ambiguous, a court may look to the

legislative history surrounding the adoption of the statute to aid in its determination of the legislature's intention in enacting the statute or provision at issue. *Mitchell v. Chapman*, 343 F.3d 811, 826 (6th Cir. 2003); *Ninety-Three Firearms*, 330 F.3d at 420; *United States v. Markwood*, 48 F.3d 969, 975 n.7 (6th Cir. 1995) ("[W]hen there is an ambiguous term in a statute, or when a term is undefined or its meaning unclear from the context of the statute, it is our duty to examine the legislative history in order to render an interpretation that gives effect to Congress's intent."). Because § 304(a) is itself silent as to the issue at hand, we look to the statute as a whole to determine if other provisions are instructive as to congressional intent and the proper interpretation of this provision.

1. Statutory Construction

Section 304(c) of the Copyright Act provides that the conveyance of an interest in a renewal copyright may, in certain instances, be terminated. According to § 304(c), any conveyance, other than by will,[7] executed before January 1,

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[7] While an author is alive, only she is entitled to the renewal and extension of a copyright of one of her works, unless she transfers that right. *See* 17 U.S.C. § 304(a)(1)(C)(i). If a copyright enters its renewal period while the author is still alive, the renewed copyright vests in the author, and she may convey her interest in that renewed copyright as she wishes, including by will. *See id.* § 304(a)(2)(B); *see also Nimmer on Copyright* § 9.04. The author's widow or spouse does not automatically obtain any interest in such copyrights. If the author holds the renewal copyright at death but does not convey the copyright by will, the copyright will be conveyed by intestate succession but will nonetheless be free from termination because the conveyance was not executed by the author. *See Nimmer on Copyright* § 11.02[A][3].

1978, by a person entitled to renew and extend a copyright under § 304(a)(1)(C), of a renewal copyright interest related to an original or renewal copyright subsisting on January 1, 1978, is potentially subject to termination. A person who conveys a renewal copyright interest prior to January 1, 1978, may terminate that conveyance pursuant to the provisions of § 304(c). For instance, an author is entitled, after a certain period of time, to terminate any interests in a renewal copyright conveyed by him. *Id.* § 304(c)(1). If an author is dead, § 304(c)(1) provides that the author's right to terminate his own transfer of an interest in a renewal copyright is owned and may be exercised in the following manner:

> (A) the widow or widower owns the author's entire termination interest unless there are any surviving children or grandchildren of the author, in which case the widow or widower owns one-half of the author's interest;
> (B) the author's surviving children, and the surviving children of any dead child of the author, own the author's entire termination interest unless there is a widow or widower, in which case the ownership of one-half of the author's interest is divided among them;
> (C) the rights of the author's children and grandchildren are in all cases divided among them and exercised on a per stirpes basis according to the number of such author's children represented.

To effectuate termination of a transfer of a renewal copyright interest initially made by the author, over fifty-percent of the termination interests must support termination. *Id.* § 304(c)(1). A termination right maybe exercised during a period of five years commencing from the end of fifty-six years from the date the copyright was originally secured or

commencing from January 1, 1978, whichever is later. *Id.* § 304(c)(3).

Importantly, if a deceased author's surviving spouse and children exercise their right to terminate renewal copyright interests conveyed by the author prior to his death, those terminated renewal copyright interests will revert to all the parties holding a termination interest, including those who did not exercise the right to terminate the transfer renewal rights. *Id.* § 304(c)(6). When the renewal rights revert to the spouse and children after an exercise of the termination interests pursuant to § 304(c)(2), "*they shall vest in those persons in the proportionate shares provided by that clause.*" *Id.* § 304(c)(6)(C) (emphasis added). In other words, if a majority of shares of those with an author's termination rights exercise those rights to terminate a grant by the author of renewal interests, a fifty-percent share of the terminated renewal copyright interests will vest in the surviving spouse, and the surviving children will divide the remaining fifty-percent in equal divided shares.

The Copyright Act also provides a process for terminating transfers of any copyright interest executed on or after January 1, 1978.[8] *See id.* § 203(a). Under § 203(a), the surviving spouse and the children of a deceased author may terminate any conveyance of a copyright interest executed on or after January 1, 1978, by the author of the copyrighted

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[8] For works copyrighted on or after January 1, 1978, Congress abandoned the renewal copyright scheme because of its complexity and instead provided for a system where the copyright endured for the life of the author plus a term of years. 17 U.S.C. § 302(a); *see also Nimmer on Copyright* § 9.02 & .10[A][2]. Hence, for copyrights created after January 1, 1978, there are no renewal provisions akin to those of § 304(a).

work.[9] A surviving spouse owns fifty-percent of the author's termination interest and any surviving children hold equal shares in the remaining fifty-percent of the termination interest. *Id.* § 203(a)(2)(A)-(B). Termination may be exercised only with the support of a majority of the termination interest shares. *Id.* § 203(a)(1). The termination interest may be exercised beginning thirty-five years from the date of the execution of the conveyance and continuing for a period of five years. *Id.* § 203(a)(3). If a majority of termination interest shares vote to terminate an author's grant of an interest in a copyright, the terminated rights revert to the surviving spouse and the author's surviving children proportionate to their termination interest. *Id.* § 203(b)(2). In other words, upon termination, a fifty-percent interest in the terminated copyright would vest in the surviving spouse and the author's surviving children would share the remaining fifty-percent of the copyright in equal shares.

The nature of the copyright interest terminated under § 203 differs from the nature of the copyright interest terminated under § 304(c). The copyright interest terminated under § 304(c) is, by the very language of the provision itself, necessarily related to a renewal copyright. *Id.* ("In the case of any copyright subsisting in either its first or renewal term on January 1, 1978, . . . the exclusive or nonexclusive grant of a transfer or license *of the renewal copyright or any right under it*, executed before January 1, 1978, . . . is subject to termination . . . .") (emphasis added). That termination under § 304(c) pertains only to grants of renewal copyright interests

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[9] A significant distinction between § 203(a) and § 304(c) is that, unlike § 304(c), § 203(a) does not provide a manner for widows or children to terminate interests they convey in a copyright.

is evident by the manner in which the provision operates as well. Termination under § 304(c) can only be exercised beginning fifty-six years from the date the original copyright was secured, or on January 1, 1978, whichever is later. *Id.* § 304(c)(3). Since the term of copyrights secured on or before January 1, 1978, is only twenty-eight years, *id.* § 304(a)(1)(A), any copyright interest terminated fifty-six years after the institution of the original copyright or later is necessarily an interest related to a renewal copyright.

Distinctively, copyright interests terminated under § 203 may be, but are not necessarily, renewal copyright interests. Whereas § 304(c) implicates only copyrights subsisting on January 1, 1978, for the purposes of § 203(a), only the date of execution of the conveyance – not the date on which the original copyright was subsisting – has significance. Any conveyance of a copyright interest executed on or after January 1, 1978, is potentially subject to termination pursuant to § 203. *Id.* § 203(a). Because copyrights created on or after January 1, 1978, are not subject to the renewal scheme, *see id.* § 302(a), such copyrights will never transform into renewal copyrights and, consequently, transfers of such copyrights will never involve renewal copyright interests. Hence, the termination of conveyances of copyrights that originated on or after January 1, 1978, will not involve the vesting of renewal copyrights. Copyrights originally secured prior to January 1, 1978, on the other hand, are subject to the renewal scheme. *Id.* § 304(a). But § 304(c) only deals with the termination of transfers of the renewal copyrights of such copyrights that are executed prior to January 1, 1978. All transfers of renewal copyrights executed by an author after January 1, 1978, are governed by § 203. Hence, the termination of copyright interests under § 203 may but does not necessarily involve renewal copyright interests. When transfers of renewal copyrights by an author are terminated

under § 203, however, those renewal copyrights vest in disproportionate shares between an author's surviving spouse and children, just as is the case under § 304(c).

Section 203 and § 304(c) are the only provisions in the Copyright Act that explicitly provide for how a deceased author's surviving spouse and children shall share renewal copyright interests, albeit after termination. No other provision in the Act provides for any other distributive scheme with respect to an author's surviving spouse and children for any copyright interest whatsoever, much less a scheme dictating that an author's surviving spouse and children will hold renewal copyright interests in equal shares. As such, § 203 and § 304(c) represent the best indication of congressional intent with respect to how renewal copyright interests should vest between a deceased author's surviving spouse and children *upon creation*. Specifically, the provisions suggest that Congress intended renewal copyrights to vest in disproportionate shares under § 304(a).

Several additional factors corroborate this conclusion. For instance, a survey of the manner in which the Copyright Act utilizes the term "vest" supports the disproportionate shares interpretation. "Vest" is not found frequently in the Copyright Act. The term first appears at 17 U.S.C. § 104A(a)(1)(A) & (b). Section 104A pertains to restored copyrights. Subsection 104A(a)(1)(A) merely provides that a copyright in are stored work vests automatically on the date of restoration. Subsection 104A(b), in turn, provides that are stored copyright vests initially in the author of the restored work. The term "vest" next appears at § 201, which states that a copyright will vest initially in the author of the work copyrighted and, for contributions to collected works, a copyright will vest in the author of the contribution that will be distinct from the copyright for the collected work. The

next point at which "vest" arises in the Act, and the first time it refers to the rights of an author's surviving spouse and children, is at § 203(b). As discussed, § 203(b) provides that, after an author's transfer of a copyright interest is terminated by the author's widow and children under the termination provision, the rights terminated will vest in an author's widow and children in shares proportionate to their termination rights. Section 203(b) then describes how parties in which terminated rights have vested may alienate those rights. The term "vest" is next found, again in reference to the rights of an author's spouse and children, at § 304. At § 304(a), the term describes how and when copyrights will vest upon renewal. As previously discussed, the subsection provides that renewal copyrights will vest in an author's surviving spouse and children if the author is deceased at the time of renewal, but it does not explicitly state in what proportion the widow and children shall share the renewal copyright. At § 304(c), the term "vest" is used to describe who will obtain the rights to a renewal copyright if a previous transfer of that renewal copyright is terminated. As at § 203, § 304(c) provides that, when a terminated renewal copyright vests in an author's surviving spouse and children, it vests in shares of the same proportion as the termination rights provided the widow and children. The term "vested" appears again at § 701, but only in reference to the powers vested in the Copyright Office by law. "Vest" surfaces for the last time in the Act at § 1320 and refers to who owns the property right to a design protected by Chapter 13 of the Copyright Act. At no point in the Act does "vest" refer to copyrights being divided into equal shares. And when the Act explicitly provides for how copyright interests will vest in an author's surviving spouse and children when they are entitled to such interests, it provides that those interests will vest in disproportionate shares between the widow and the children. Applying the term "vest" consistently, particularly when in reference to the rights of an

author's surviving widow and children, supports the disproportionate shares interpretation that a surviving spouse obtains a fifty-percent interest in a renewal copyright upon renewal, while an author's surviving children obtain equal shares in the remaining fifty-percent.

The disproportionate shares interpretation is also bolstered by the fact that an equal shares interpretation would produce an odd result. If we interpreted § 304(a) as providing for equal shares, the shares eventually held by a widow and her children would ultimately rest upon whether the author assigned copyright interests that vested prior to his death, or, instead, never assigned such interests or assigned interests that vested only after his death. In the case of the former, a surviving spouse would hold a fifty-percent interest in the event of the termination of that transferred renewal interest and the author's surviving children would share the remaining fifty-percent equally. In the case of the latter, all parties would share equally upon renewal of the copyright. No statutory language suggests why such a result should occur. In addition, no logic readily comes to mind to support disparate results under these two scenarios. Insofar as an equal shares interpretation would produce absurd results, it should be avoided. *See Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575, 102 S. Ct. 3245, 73 L. Ed. 2d 973 (1982) ("Interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available.").

The district court was not persuaded that the Copyright Act's termination provisions are sufficiently similar to § 304(a) so that renewal copyright interests should vest upon renewal in the same manner they vest upon termination. The principal basis for the district court's refusal to adopt this approach was its understanding that termination can be

effected only by the agreement of those possessing a majority of the termination interests, whereas renewal interests vest if any one of those entitled to such an interest exercises that right. Without further explanation, the court concluded that the fact that the termination interest is exercised differently than the renewal interest requires that such interests vest differently. First of all, the district court's reasoning contains a misapprehension of copyright law. A renewal copyright will automatically vest as of the last day of the original copyright in any person entitled to the renewal copyright even absent an affirmative act by any such person. *See* 17 U.S.C. § 304(a)(2)(B)(ii). No renewal copyright interest need be exercised to obtain ownership. Second, the district court's reasoning provides no explanation for why the distinction offered requires that the reversion of renewal copyrights upon termination and upon renewal differ.

The district court also noted that "the termination interest [is] a separate and distinct right. "Termination is separate and distinct in the sense that it is exercised in a different manner than the renewal right. However, the aim of the termination provision is the same as that of the renewal provision. Both provisions seek to provide an author and his descendants the power to recapture ownership of a previously assigned copyright. Moreover, the termination right is necessarily distinct from the renewal interest because the termination interest, particularly as provided for in § 304(c), operates to enable the recapture of a previously assigned renewal interest. Finally, § 304(a) and § 304(c) are not entirely unrelated. Indeed, the two provisions are subsections of the same section of the Copyright Act. More significantly, the latter expressly references the former. In describing what transfers of renewal interests may be terminated, § 304(c) provides that any grant executed "by any of the persons designated by subsection (a)(1)(C) of this section, otherwise than by will, is subject to

termination." Subsection 304(a)(1)(C) is the subsection that designates a deceased author's surviving spouse and children as being entitled to renewal and extension of a copyright.

As justification for ignoring § 304(c) when interpreting § 304(a), the district court relied considerably on the proposition that, if Congress intended for copyright interests to vest identically under each provision, it could have explicitly added such language to § 304(a) when it adopted § 304(c). The court concluded: "That Congress chose not to add similar language to Sec. 304(a) suggests that Congress did not consider the rights guaranteed under the two provisions to be similar." We do not ascribe any such substantive significance to the fact that Congress did not so amend the renewal provisions when it enacted § 304(c).[10] The failure of Congress to enact a particular provision or amendment can be linked to a myriad of hypothetical causes. Absent evidence suggesting otherwise, a court should not assume that any particular cause explains the inaction. *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 110 S. Ct. 2668, 110 L. Ed. 2d 579 (1990) is instructive. In *Pension Benefit*, the Supreme Court declined to attach any significance to Congress's failure to enact a proposed amendment to prior enacted legislation. In doing so, the Court noted that "Congressional inaction lacks 'persuasive significance' because 'several equally tenable inferences' maybe drawn from such inaction, 'including the inference that the existing

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[10] Section 304(a) is a re-codification of the prior renewal provision, which was initially at 17 U.S.C. § 24 (1909). *See* H.R. No. 94-1476 ("Subsection (a) of section 304 reenacts and preserves the renewal provision, now in Section 24 of the statute . . . ."). The prior provision did not dictate in what proportion renewal interests should vest and the re-codification did not amend the provision to clarify this issue.

legislation already incorporated the offered change.'" *Id.* at 650 (quoting *United States v. Wise*, 370 U.S. 405, 411, 82 S. Ct. 1354, 8 L. Ed. 2d 590 (1962)). In this case, the district court inferred that, by not incorporating into § 304(a) the distributive scheme provided in § 304(c), Congress intended § 304(a) to operate differently. But we could just as easily infer that Congress assumed adopting § 304(c) would clarify the proper distributive scheme under § 304(a). The availability of such disparate inferences demonstrates that Congress's failure to adopt changes to § 304(a) when enacting § 304(c) should be accorded little, if any, significance.

Only one other court, aside from the district court, has directly ruled on the issue of the distribution of renewal copyright interests between a deceased author's widow and children upon renewal. *See Venegas-Hernandez v. Peer*, 283 F. Supp. 2d 491 (D. P.R. 2003). In *Venegas-Hernandez*, the court considered the interest an author's widower held in copyrights renewed after her husband's death in relation to the interests held by the author's children. The widower argued that she was entitled to a fifty-percent interest and that the children were entitled to equal shares of the remaining fifty-percent interest. The children, of course, argued that all members of the renewal class shared equally in the renewed copyrights. The court determined that the widower and the children shared in the renewal copyrights equally. In doing so, the court rejected the widower's argument that § 304(c) of the Act should be read *in pari materia* with § 304(a).

In distinguishing § 304(c) from § 304(a), the court in *Venegas-Hernandez* noted that, under § 304(c), if an author bequeaths by will copyright renewal interests vested in him prior to his death, such grants are not subject to termination. 283 F. Supp. 2d at 504. Rather, the court noted, such renewal interests will transfer subject to the terms of the will. The

court then merely asserted that "the termination provisions are meant to tackle factual circumstances materially different" from the renewal provisions. *Id.* While this assertion is certainly true, on the matter focused on by the court, the renewal and termination provisions are the same. Just as termination cannot be exercised against a renewal interest transferred by an author pursuant to his will, provided that the renewal interest vested in the author prior to his death, so are descendants' renewal interests null and void when an author bequeaths by will renewal interests vested in him prior to his death.

The *Venegas-Hernandez* court also recognized that, in a Committee Report originating from the House Committee on the Judiciary and relating to the 1976 amendments to the Copyright Act, the committee noted that "[i]t is not clear how the shares of a class of renewal beneficiaries are to be divided *under the existing law*." H.R. No. 94-1476 (emphasis added). The court concluded that this statement signified that, in adopting § 304(c) in the 1976 amendments, Congress did not intend the vesting of termination rights to dictate the manner in which renewal rights vest under the renewal provisions. *Venegas-Hernandez*, 283 F. Supp. 2d at 505. The statement does not mandate such a conclusion. First, the statement was made by a committee reporting on proposed legislation. The report merely stated that existing law – in other words, the law in existence prior to the adoption of the proposed legislation – was unclear as to how renewal interests are divided. Considering that the Copyright Act did not at that time, nor has it at any time, specified how renewal copyright interests are to be divided between an author's widower and her children upon renewal, such a statement was merely a recognition of fact. Second, the statement did not speculate as to what effect the adoption of § 304(c) would have on the division of renewal interests under § 304(a). Nor did it state

that § 304(c) and § 304(a) should be construed wholly distinctly. At most, the statement can be read as signifying that the committee was unsure what, if any, effect § 304(c) would have on the interpretation or application of § 304(a). Even if the statement suggested that Congress believed that renewal interests vested in equal shares under the law prior to the amendments, such an interpretation would not be entitled to any special deference because the law then in effect was adopted in 1909. As the Supreme Court has noted, "the interpretation given by one Congress (or a committee or a Member thereof) to an earlier statute is of little assistance in discerning the meaning of that statute." *Pub. Employees Ret. Sys. of Ohio v. Betts*, 492 U.S. 158, 168, 109 S. Ct. 2854, 106 L. Ed. 2d 134 (1989).

Turner presented many of the arguments utilized by the district court and the *Venegas-Hernandez* court in an attempt to distinguish § 304(a) from the Copyright Act's termination provisions. As we explained, none of these arguments is convincing. The only interpretation of § 304(a) remotely supported by the language of the Copyright Act itself is that renewal copyright interests should vest disproportionately. Recognizing the complete lack of express textual support in the Act for an equal shares interpretation, Turner also offers several extra-statutory arguments in favor of such an interpretation. We similarly find none of these arguments persuasive.

Turner first contends that *DeSylva* supports an equal shares interpretation. In *DeSylva*, the Supreme Court – interpreting a prior iteration of the Copyright Act – held that a deceased author's children's interest in a copyright renewed after the author's death vested upon renewal and was not dependent on whether the author's widow or widower was also deceased at the time of renewal. 351 U.S. at 580. In

doing so, the Court stated that, "on the death of the author, the widow and children of the author succeed to the right of renewal as a class, and are each entitled to share in the renewal term of the copyright." *Id.* Turner argues that, if a deceased author's spouse and children are entitled to renew copyrights as a class, as members of the same class they must share in the renewal copyrights equally. The district court found this argument to be persuasive, concluding that, "[i]f the members of the class are each entitled to share in the rights created, it follows logically that the class members will share equally of that right, absent any indication from Congress of a contrary intent." The court's deduction is unfounded, and Turner's argument is unpersuasive. First, *DeSylva* can only be read to hold that an author's surviving spouse and children are each entitled to share in a copyright renewed after the author's death. If the Supreme Court intended for its holding to dictate how renewal interests would be divided between an author's widow and children, it would have so held. Yet, the Court expressly declined to do so. *Id.* at 582 ("[T]here remains the question of what are the respective rights of the widow and child in the copyright renewals, once it is accepted that they both succeed to the renewals as members of the same class. Since the parties have not argued this point, and neither court has passed on it, we think it should not be decided at this time.").

Second, even assuming that - by holding that surviving spouses and children are entitled to renew copyrights as a class - the Court intimated that renewal copyright interests should vest equally between spouses and children, the Court made this suggestion *prior to the adoption of § 304(c) and § 203*. Sections 203 and 304(c) were adopted in 1976. *See* Act of Oct. 19, 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976);*see also Nimmer on Copyright* § 11.01[A]. *DeSylva* was decided in 1956. Thus, even if *DeSylva* suggests that

Congress's intent at the time appeared to be that spouses and children hold equal shares in renewal copyright interests, the subsequent enactment of § 203 and § 304(c) provides evidence of a more recent and contrary intent. Any deductions or speculations in *DeSylva* as to how renewal copyright interests should vest upon creation are, therefore, outdated and uninstructive.[11] *DeSylva* would only have persuasive weight if we found that no portion of the Copyright Act provides any guidance as to how § 304(a) should be interpreted, which we do not find to be the case.

Finally, even if we assume *DeSylva* held that surviving spouses and children share equally in renewal copyrights (which it patently did not), it is unclear whether *DeSylva* still accurately describes the nature of the interest a deceased author's surviving spouse and children have in a renewal copyright. At the time of *DeSylva*, the Copyright Act did not address clearly whether an author's spouse and children could concurrently share in a copyright renewed after his death. The Court's holding in *DeSylva* that the parties held the right of renewal "as a class," and could consequently share in such renewal copyrights simultaneously, was an attempt to discern how Congress intended spouses and children to obtain copyright interests absent clarifying language. Subsequent to *DeSylva*, Congress enacted such clarifying language in the form of § 304(a)(2)(B), which made explicit in the Act itself that an author's widow and children could hold interests in a

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[11] Other courts that have assumed an author's surviving spouse and children hold equal shares in copyrights renewed after the author's death have also done so prior to the adoption of § 203 and § 304(c). *See Bartok v. Boosey & Hawkes, Inc.*, 523 F.2d 941, 943 n.2 (2d Cir. 1975); *Hill & Range Songs, Inc. v. Fred Rose Music, Inc.*, 403 F. Supp. 420, 436 (M.D. Tenn. 1975). Consequently, these cases are also uninstructive.

renewal copyright concurrently. *See* Act of Oct. 19, 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976). Section 304(a)(2)(B) contains no language whatsoever suggesting that an author's surviving spouse and children, or any other parties entitled to a renewal copyright interest, share such an interest as a class or that they constitute a class for any purposes. Moreover, by providing that the renewal copyright interests vest in "any person" entitled to renewal under § 304(a)(1)(C), the provision suggests that renewal copyright interests vest in individuals and are not taken by or vested as a class. For all of these reasons, we decline to view *DeSylva* as persuasive authority for an equal shares interpretation of § 304(a).

Turner next argues that *Nimmer on Copyright*, the leading legal treatise on copyright law, also supports an equal shares interpretation of § 304(a). *Nimmer on Copyright* does suggest that renewal copyrights should vest equally between a deceased author's surviving spouse and children. However, we do not find its logic persuasive. The treatise states: "Because the [Copyright] Act fails to indicate any internal division for what has been established as a single class, it appears more logical to regard all members of the class – widows and children – alike, as equally sharing claimants." *Nimmer on Copyright* § 9.04[A][1]. By stating that widows and children constitute a class, the treatise commits the same fallacy as the district court in assuming that *DeSylva* continues to accurately describe how an author's surviving spouse and children share in renewal copyrights. Moreover, the treatise does not the address relationship between § 304(a) and § 304(c), much less the relationship between § 304(a) and § 203. Rather, the treatise merely assumes no other provisions are relevant to the interpretation of § 304(a) and concludes that a reasonable interpretation of that provision is that widows and children take renewal copyrights equally. This

conclusion, however, is less than compelling. The treatise essentially admits that the proper interpretation of § 304(a) is unclear and that an interpretation that renewal copyrights interests shall be divided equally between a deceased author's surviving spouse and children is as reasonable an interpretation as any other. We will not rely on such an unenthusiastic conclusion to serve alone as the basis of our judicial opinion.

The last authority Turner submits in support of an equal shares interpretation is an opinion letter from the Register of Copyrights written to a member of the United States House of Representatives in response to an inquiry about whether the manner in which copyright interests vest upon renewal under § 304(a) should be clarified by legislation. Letter from Marybeth Peters, The Register of Copyrights of the United States of America, to Representative Howard L. Berman, United States House of Representatives (Sept. 11, 2003) (hereinafter "Peters Letter"). While statutory interpretations adopted by the Copyright Office pursuant to authority delegated it by Congress and which enjoy the force of law are entitled to deference if reasonable, *see United States v. Mead Corp.*, 533 U.S. 218, 227, 121 S. Ct. 2164, 150 L. Ed. 2d 292 (2001); *Cablevision Sys. Dev. Co. v. Motion Picture Ass'n of Am., Inc.*, 266 U.S. App. D.C. 435, 836 F.2d 599, 607-10 (D.C. Cir. 1988), interpretations suggested in opinion letters – which lack the force of law – are entitled to respect only insofar as they are persuasive. *See Christensen v. Harris County*, 529 U.S. 576, 587, 120 S. Ct. 1655, 146 L. Ed. 2d 621 (2000). We are not persuaded by the Register's opinion letter that an equal shares interpretation is the most reasonable interpretation of § 304(a).

The letter, which admits that there is not a "definitive answer" to the proper interpretation of § 304(a) and that an

equal shares interpretation "is not the only plausible reading" of the provision, Peters Letter at 1-2, offers only two arguments in favor of an equal shares interpretation that we have not yet addressed. First, the letter suggests that § 304(c), by granting spouses fifty-percent of a deceased author's termination interest, intended only to grant spouses control over whether the grant of a renewal copyright could be terminated. According to the letter, tying the proportion in which renewal interests vested upon termination to the proportion in which eligible parties held termination interests was of secondary importance and, hence, should not control the interpretation of § 304(a), a completely separate section. This argument is not persuasive because, even if providing that renewal interests vested in disproportionate shares after termination was an afterthought, this method of distribution remains the only method by which the Copyright Act explicitly provides for the distribution of renewal copyright interests and the only indication of Congress's intent on this matter.

Second, the letter claims an equal shares interpretation is most reasonable because legislative history suggests that, in enacting § 304(a), Congress intended to protect then-existing expectancies in renewal copyrights. *See, e.g.*, H.R. Rep. 94-1476 ("Subsection (a) of section 304 reenacts and preserves the renewal provision . . . . A great many of the present expectancies in these cases are the subject of existing contracts, and it would be unfair and immensely confusing to cut off or alter these interests."). The letter suggests it was Congress's clear intent to preserve expectancies in the proportional division of renewal copyrights, but this characterization is misleading. If the renewal provisions had not been preserved at § 304(a) for copyrights already subsisting in 1978, then § 203 would have governed those copyrights, effectively eliminating any prospective renewal

copyrights in those works because § 203 abandoned the renewal scheme. Section 304(a) was retained to ensure that those who expected to hold an interest in a renewal copyright were not deprived of such an interest altogether. Indeed, in discussing the rationale for maintaining the renewal scheme for copyrights already in existence at the time § 203 was enacted, the Copyright Office explained:

> Certain persons will have acquired expectancies of the future renewal rights under the present law – expectancies that might accrue to them when the time for renewal arrives. . . . Substantial sums have been invested in some of these expectancies. *To apply the new law would deprive potential claimants and their assignees of their expectancies in many cases. Consequently, we believe that the present provisions as to who may renew should remain in effect for preexisting copyrights in their first term.*

Copyright Law Revision: Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, at 57 (1961) (emphasis added); *see also* H.R. Rep. 94-1476 ("Subsection (a) of section 304 reenacts and preserves the renewal provision . . . . A great many of the present expectancies in these cases are the subject of existing contracts, and it would be unfair and immensely confusing to cut off or alter these interests."); Copyright Law Revision, Part 6, Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1965 Revision Bill, at 94 (1965) ("Works in their first term are now subject to specific renewal expectancies, many of which have been bargained for or sold. We believe it would be unjust *to destroy* these expectancies . . . .") (emphasis added). The expectancies Congress intended to protect were expectancies in the eventual existence of renewal copyrights;

there is no indication that Congress intended to protect an expectancy that renewal copyrights would vest in equal shares between a deceased author's surviving spouse and children upon renewal.

Even if Congress intended to protect expectancies in the proportional division of renewal copyrights by preserving the renewal scheme, we have been provided no evidence of what such expectancies were, much less any evidence that it was well-settled at the time it was expected that renewal copyrights would be shared equally between a deceased author's surviving spouse and children. Case law is similarly uninstructive. *DeSylva*, the only Supreme Court case addressing renewal copyright interests, sent mixed signals on the issue of division of those interests. The case refrained from deciding the issue, but did hold that surviving spouses and children shared renewal copyrights as a class, which some may have interpreted as requiring that these copyrights be divided equally. On the other hand, *DeSylva* looked to state law to determine whether an illegitimate child was included within the definition of "children" under the Act, suggesting that state law might also govern the distribution of renewal copyrights under the Act, in which case renewal copyrights would often be shared disproportionately. *See also Nimmer on Copyright* § 9.04[A][1] (addressing whether it is desirable to follow *DeSylva* and look to state law to determine the proper division of renewal interests under § 304(a)). In other words, *DeSylva* does not provide conclusive support for either equal shares or disproportionate shares expectancies. Finally, the letter itself undermines its own proposition. After suggesting that an equal shares interpretation of § 304(a) is best because of Congress's intent to protect expectancies, the letter admits that the expectations of surviving children and spouses are even currently unclear. Peters Letter at 6 (stating that, if Congress were to clarify § 304(a) by statute, it should

conduct "a factfinding exercise to determine what are the actual practices and expectations among authors and their spouses and children").

In sum, the various authorities and rationales offered in support of an equal shares interpretation do not persuade us that we should disregard § 304(c) in construing § 304(a) or that an equal shares interpretation of § 304(a) more closely approximates congressional intent than a disproportionate shares interpretation of that provision.

2. History of the Renewal and Termination Provisions

The history of the Copyright Act's renewal and termination provisions further supports the conclusion that a deceased author's surviving spouse and children should take disproportionate shares upon renewal of a copyright after the author's death. The renewal provision of the Copyright Act originates with the original Copyright Act of 1790, which was adopted by the first Congress and allowed for the author alone to secure a 14-year renewal term of his original copyright, provided he was alive on the first day of the renewal. Act of May 31, 1790, 1 Stat. 124. In 1831, the renewal provision was amended to grant a renewal right to an author's surviving spouse and children in the event the author was deceased at the time the original copyright expired. Act of Feb. 3, 1831, 4 Stat. 436. The language of the provision was somewhat revised in 1870, but its substance remained the same. Act of July 8, 1870, 16 Stat. 212. Then, in 1909, the renewal provision was amended to grant additional parties an entitlement to the renewal copyright of a deceased author's work provided that the author and her spouse and children were deceased at the time of renewal. 17 U.S.C. § 24 (1909). Specifically, the amendment granted a deceased author's executors and, in the absence of a will, her next of kin the

right to the renewal copyright in her work if the author's widower and children were also deceased at the time of renewal. *Id.* The amendment also extended the renewal term from fourteen years to twenty-eight years. *Id.*

It is commonly recognized that the renewal provision was initially adopted to provide authors the opportunity to recapture ownership of a copyright alienated during its original term. At the time an author initially copyrights a work, the copyright may be of little value and an assignment of the work will bring little economic benefit to the author. However, over time, the value of the copyright may increase as the work becomes more well-known and marketable. The renewal copyright concept allows the author to recapture ownership of the copyright for this work and then obtain a greater economic benefit from its exploitation. *See* H.R. Rep. No. 2222, 60th Cong., 2d Sess.; *see also Nimmer on Copyright* § 9.02. As the Second Circuit has explained, "the reason for including a renewal term in the Copyright Act was to permit an author who sold the rights in his work for little consideration, when measured against the work's subsequent success, to enjoy a second opportunity with more bargaining power to reap the full value of the work." *Woods v. Bourne Co.*, 60 F.3d 978, 982 (2d Cir. 1995). This purpose was frustrated by the Supreme Court in *Fisher Music* because, in that case, the Court recognized that an author can assign away his renewal copyright interest prior to its vesting and that he is bound by such an assignment if the renewal interest vests prior to his death. In essence, the Court allowed an author to assign away his second chance at ownership of a copyright while assigning his right to the original copyright. *See Nimmer on Copyright* § 11.01[A]. Prior to the adoption of the termination provision, then, if an author assigned away his renewal copyright interest and that interest vested prior to the author's death, the assignment was valid and neither the

author nor his heirs could obtain a renewal interest in a work so assigned. The only means by which descendants could obtain title to such an assigned renewal interest was if the author died before the renewal interest vested in him, in which instance the assignment was not executed and the renewal interests vested in the author's descendants pursuant to § 304(a).

In its 1976 amendments to the Copyright Act, Congress attempted to restore to authors and their descendants a second opportunity to recapture copyrights, notwithstanding *Fisher Music*, by adopting the termination provisions at 17 U.S.C. § 304(c). *See Nimmer on Copyright* § 11.01[A]. As noted by the Supreme Court, the termination right granted in § 304(c) "was expressly intended to relieve authors of the consequences of ill-advised and unremunerative grants that had been made before the author had a fair opportunity to appreciate the true value of his work product." *Mills Music*, 469 U.S. at 172-73. In granting authors and their descendants termination rights, Congress provided them the opportunity to reclaim renewal interests even after such interests had been vested in and assigned by the author. As Nimmer notes, the aim of the termination provision, like that of the renewal provision, is to "achiev[e] a reversion of rights." *Nimmer on Copyright* § 11.01[A].

In essence, then, both the renewal provision and the termination provision were intended to grant authors and their descendants the right to reclaim ownership over an alienated copyright. Furthermore, the termination provision was adopted because the second chance Congress intended to provide authors under the renewal provisions was frustrated by the fact that the Court in *Fisher Music* found that an author could assign his future renewal interest and could be bound by that assignment if the renewal vested in him during his life.

The termination provisions, particularly § 304(c), attempt to provide descendants and authors the same opportunity to reclaim ownership of a copyright that could have been reclaimed under the renewal provisions but for a previous assignment of the renewal interests by the author. Insofar as the termination provisions grant descendants a similar chance to recapture ownership over copyright interests as the renewal provision, it logically follows that the recaptured rights should vest in the same way under each provision.

3. Conclusion

The interpretive interests of adhering to legislative intent and of construing a statute consistently and cohesively dictate that we interpret § 304(a) as providing that, when the copyright to an author's work is renewed after the author's death and that author is survived by a spouse and children, the surviving spouse holds a fifty-percent share in the renewal copyright and the surviving children hold equal divided shares in the remaining fifty-percent. This interpretation, we believe, is most consistent with the Copyright Act in its entirety and also with the history and purpose of the Act's renewal provisions. Congress has clearly indicated that, whenever grants of renewal interests are terminated, such interests will vest in disproportionate shares between a deceased author's surviving spouse and children. *See* 17 U.S.C. §§ 203& 304(c). A deduction, absent contrary statutory authority, that such interests should vest any differently upon creation would be unfounded and illogical.

The practical result of our interpretation of § 304(a) is that Turner holds a 7.14% interest in the renewal copyright at issue and, as the assignee of the remaining interests in the renewal copyrights, RMMI holds a 92.86% interest in those copyrights.

B. Statute of Limitations/Laches

In its motion for summary judgment, RMMI asserted that the statute of limitations and laches precluded Turner from recovering any royalties that accumulated prior to July 9, 1998.[12] The district court refused to consider this argument, noting:

> The issue of whether Turner is entitled to recover renewal royalties, other than those interpleaded by BMI, has not been raised by either RMMI's or Turner's motion for summary judgment. Therefore, the Court takes no position on whether Turner has a claim against RMMI for a portion of renewal royalties previously received by RMMI (and notes that Turner has not asserted such a claim against RMMI in this action) or whether that claim would be barred in whole or in part by the statute of limitations or the doctrine of laches.

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[12] The statute of limitations under the Copyright Act is three years from the accrual of the claim in question. 17 U.S.C. § 507(b). According to RMMI, Turner was aware of her entitlement to an interest in the renewed copyrights at least by 1995, as evidenced by a letter written by her attorney. RMMI asserts that Turner did not assert a claim for royalties prior to her response to RMMI's cross-claim in this action, which was filed on July 9, 2001. RMMI argues that, while Turner's 2001 claim suffices to meet the statute of limitations for royalties accruing since July 8, 1998, Turner is barred by the statute of limitations and laches from asserting a claim for royalties any time prior to that date because her claim of July 9, 2001, would necessarily be asserted more than three years after the accrual of such royalties.

RMMI thereafter filed a motion pursuant to Fed. R. Civ. P. 59(e) asking the court to alter or amend its judgment. RMMI argued that the court erred by failing to consider whether the statute of limitations or laches barred Turner from asserting claims for royalties against RMMI. The district court denied that motion. On appeal, RMMI argues that this denial was in error because RMMI continuously asserted that Turner was barred from recovering any royalties earned by the renewal copyrights prior to July 9, 1998.

The district court did not err in refusing to alter or amend its judgment. Section 507(b) of the Copyright Act provides a statute of limitations for claims asserted under the Act. *Nimmer on Copyright* § 12.05; *see also Mihalek Corp. v. Michigan*, 814 F.2d 290, 297 (6th Cir. 1987) (classifying 17 U.S.C. § 507(b) as presenting a statute of limitations). An assertion of a statute of limitations is an affirmative defense that must be properly raised. *See* Fed. R. Civ. P. 8(c). Likewise, laches is an equitable remedy that must be properly raised as an affirmative defense. *See Ruiz v. Shelby County Sheriff's Dep't.*, 725 F.2d 388, 393 (6th Cir. 1984).[13] RMMI has asserted these affirmative defenses against Turner. Turner, however, does not contest the district court's finding that she did not present a claim against RMMI for royalties already paid to RMMI by BMI derived from the licensing of the renewed copyrights at issue. Hence, we accept the district court's finding. *See Little*, 265 F.3d at 361. Moreover, this determination is supported by the pleadings. In her motion for summary judgment, Turner only asserted entitlement to the

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[13] Although circuits are split as to whether laches is available as a defense under the Copyright Act, *see Nimmer on Copyright* § 12.06, laches is available as an affirmative defense in a copyright action in the Sixth Circuit. *See Hoste v. Radio Corp. of Am.*, 654 F.2d 11 (6th Cir. 1981).

funds interpleaded by BMI. And, on appeal, Turner concedes that she has asserted no claim against RMMI.

Because Turner has presented no claim against RMMI for royalties, RMMI has no claim of Turner's against which to assert the affirmative defenses of laches or the statute of limitations. Turner's only claim is against BMI for the interpleaded funds. The affirmative defenses are for BMI, not RMMI, to assert. Therefore, we affirm the district court's denial of RMMI's motion to alter or amend its judgment on the issue of whether Turner was barred from asserting claims for certain royalties against RMMI.

III.

For the foregoing reasons, we reverse the judgment of the district court, grant summary judgment for RMMI, and remand the case for proceedings consistent with this opinion.

DISSENT

MARTHA CRAIG DAUGHTREY, dissenting. I would affirm the judgment of the district court, for reasons given in Judge Campbell's well-reasoned opinion. That opinion looks to the plain meaning of the controlling statute, 17 U.S.C. § 304(a)(1)(C), which devolves rights to copyright renewal if the author is not living on "the widow, widower, or children of the author" without specifying the disproportionate shares read into the provision by the majority here. I see no reason for us to do so in the absence of a Congressional directive, or – at minimum – a determination that the language used in the statute is ambiguous. It clearly is not.

Moreover, Congress certainly knew how to create a disproportional distribution scheme, as evidenced by the

provisions in § 304(c). That it did not employ similar language in § 304(a) can only mean that it did not intend that section to mandate disproportionality.

I find instructive the Supreme Court's opinion in *DeSylva v. Ballentine*, 351 U.S. 570, 76 S. Ct. 974, 100 L. Ed. 1415 (1956), in which the Court held that the phrase "widow, widower or children" found in § 24 of the Copyright Act of 1909 created a class of persons who "succeed to the right of renewal as a class, and are each entitled to share in the renewal of the copyright." *Id.* at 580. The Court explained, "[P]utting each word in its proper context[,] we are unable to say, as the widow contends we should, that the clear purport of the clause in question is the same as if it read 'or the widow, or widower, if the author be not living, or the children if the author, and widow or widower, be not living.'" *Id.* at 573. Likewise, I conclude that the district court was correct in finding that § 304(a) creates a class whose members take equally, in the absence of Congressional instruction to the contrary. That the court in *DeSylva* said no more about the distribution was not caused by any disinclination to decide or instruct upon the issue, as the majority now suggests, but rather a recognition that they need not say more because the issue had not been presented. *See id.* at 582 (noting that although "there remains the question of what are the respective rights of the widow and child in the copyright renewals, once it is accepted that they both succeed to the renewals as members of the same class . . . , [s]ince the parties have not argued this point, and neither court below has passed on it, we think it should not be decided at this time").

This interpretation is also endorsed by the preeminent legal treatise on copyright, *Nimmer on Copyright*. Addressing divisions within the "widow-children class," the authors note that "the Supreme Court in *DeSylva* expressly left open the

question as to whether the widow and children share equally on a per capita basis or whether the widow is entitled to a one-half interest, and the children on a per stirpes basis share equally in the remaining half," but add that "it appears to be more logical to regard all members of the class - widow and children - alike, as sharing claimants." 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 9.04[A][1]. Also persuasive is the opinion letter from the Register of Copyrights, endorsing the result reached by the district court in this case.

Finally, I am not inclined to embrace the majority's *in pari materia* analysis. Interpreting the statute in the manner suggested would make sense only if the statute had been adopted as a whole. For this reason, I also find *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 110 S. Ct. 2668, 110 L. Ed. 2d 579 (1990), readily distinguishable from the current case. The failure of Congress to enact a proposed amendment in *Pension Benefit* is simply not the equivalent of the legislative history in this case, in which Congress did amend an existing section of the statute, namely § 304(c), to create a distinction that it did not extend to the statutory provision at issue here, § 304(a). *Pension Benefit* cannot be read to counsel against the distinction between these two provisions by invoking the *in pari materia* doctrine to read them as a whole. To do so would be to create a judicial fabrication that was not intended by Congress. Indeed, the length and the complexity of the majority opinion indicate how much strain is required to fabricate a distribution system that simply does not exist in the statute.

Rather than engage in what seems to me to constitute a clear case of judicial activism, I respectfully dissent.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

NO. 3:01-0453

[Filed April 10, 2002]

BROADCAST MUSIC, INC.,	)
	)
v.	)
	)
ROGER MILLER MUSIC, INC. and SHANNON MILLER TURNER	)
	)

JUDGE CAMPBELL

MEMORANDUM

Pending before the Court is the Motion of defendant and cross-claimant Roger Miller Music, Inc. ("RMMI") for Summary Judgment (Docket No. 36), and the Cross-Motion of defendant Shannon Miller Turner ("Turner") for Summary Judgment (Docket No. 39). For the reasons set forth below, RMMI's Motion (Docket No. 36) is DENIED and Turner's Motion (Docket No. 39) is GRANTED.

This is an interpleader action brought by Broadcast Music, Inc. ("BMI"), a performing rights organization that collects royalties for performances of copyrighted musical works on behalf of authors and publishers. BMI seeks a declaratory judgment to determine what portion of the royalties for certain works written by the late Roger Miller shall be paid to one of Miller's surviving children, defendant Turner, and what portion shall be paid to defendant RMMI, a corporation representing the interests of Miller's widow and six other surviving children. BMI has deposited with the Court a portion of the royalties that it has collected from renewal copyrights since receiving a demand letter from Turner's attorney claiming entitlement to 12.5% of the renewal interests for the works in question (the "interpleaded funds").

At issue is the proper interpretation of Section 304(a) of the Copyright Act of 1976. Turner claims that, pursuant to Sec. 304(a), she is entitled to a one-eighth share (or 12.5%) of the renewal interest in those works by Miller that were renewed after his death in 1992.[1] Turner contends that Sec. 304(a) requires the renewal interest to be divided equally among Miller's widow and each of the seven surviving children. Defendant Shannon Miller Turner's Memorandum of Law In Support of Motion for Summary Judgment ("Turner Memorandum") at 6 (Docket No. 40). RMMI contends in its cross-claim that under Sec. 304(a) Miller's widow is entitled to 50% of the renewal interests and the surviving children divide the remaining 50% on a *per stirpes* basis. Memorandum in Support of Defendant/Cross-claimant

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[1] Section 304(a) specifies which classes of persons can renew the copyright after the initial copyright term has run. The author has an exclusive right to renew during his lifetime. *See also De Sylva v. Ballentine*, 351 U.S. 570, 574 (1956).

Roger Miller Music, Inc. for Summary Judgment ("RMMI Memorandum") at 2 (Docket No. 37). RMMI also contends that Turner's right to the interpleaded funds must be limited by the Copyright Act's statute of limitations and/or the doctrine of laches. *Id.* The parties agree that there is no published case law directly on point, presenting the Court with a case of first impression. The parties also agree on all issues of material fact; therefore, this issue is ripe for summary judgment.

Roger Miller, the famous songwriter and performer, died testate in 1992. RMMI's Statement of Undisputed Material Facts, ¶ 6 (Docket No. 38). Under the terms of his will, he bequeathed all interests in his copyrights to his widow, Mary Arnold Miller. *Id.* at ¶ 7. Mrs. Miller assigned these rights to RMMI. *Id.* at ¶ 5. Six of Miller's seven children also assigned their renewal copyright interests to RMMI. *Id.* at ¶ 8. The seventh, Turner, chose not to assign her renewal copyright interests to RMMI. *Id.* It is undisputed that Turner has an interest in the renewal of the works at issue in the Complaint (Docket No. 1, Schedule 1). RMMI Memorandum at 12; Memorandum of Plaintiff, Broadcast Music, Inc., in Response to Defendants' Cross-motions for Summary Judgment ("BMI Memorandum") at 6 (Docket No. 44). The question presented is the extent of Turner's share of those renewal copyright interests.

The persons entitled to the renewal term are enumerated in Section 304(a)(1)(C) as follows:

> (i) the author of such work, if the author is still living,
> (ii) the widow, widower, or children of the author, if the author is not living,

> (iii)the author's executors, if such author, widow, widower, or children are not living, or
>
> (iv)the author's next of kin, in the absence of a will of the author, shall be entitled to a renewal and extension of the copyright in such work for a further term of 67 years.

17 U.S.C. § 304(a)(1)(C).

The renewal term harkens back to the early years of our nation. The original Copyright Act of 1790 provided for a 14-year renewal term, provided that the author was alive on the first day of the renewal term. Act of May 31, 1790, 1 Stat. 124. No provision was made for renewal by anyone except a living author. *See De Sylva v. Ballentine*, 351 U.S. 570, 574 (1956). In 1831, this term was amended to add a renewal right for the author's surviving widow and children. Act of February 3, 1831, 4 Stat. 436. The 1831 Act provided that, if the author were dead at the time the initial copyright term expired, and "shall have left a *widow, or child, or children,* either or all then living, the same exclusive right shall be continued to ... such *widow and child, or children,* for the further term of fourteen years...." *Id.* (emphasis added). This language was revised in 1870 to read as follows:

> That the author, ... or his *widow or children,* if he be dead, shall have the same exclusive right continued for the further term of fourteen years ....

Act of July 8, 1870, 16 Stat. 212. (emphasis added). In 1909, this provision was substantially revised to add additional persons entitled to renewal rights – the author's executors, or in the absence of a will, his or her next of kin. 17 U.S.C.

§ 24 (1909). Section 24 provided that the renewal term vested in:

> ...the author of such work, if still living, or the *widow, widower, or children* of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors, or in the absence of a will, his next of kin shall be entitled to a renewal and extension of the copyright in such work for a further term of twenty-eight years....

Id. (emphasis added). Section 24 of the 1909 Act became Sec. 304(a) of the 1976 Act in substantially the same form, but for a further extension in the length of the renewal term. The latest revision to Sec. 304(a) occurred in 1998, at which time the renewal term was once again extended. Thus, the relevant language here, "widow[, widower,] or children," has not been substantively changed since 1870.

Section 304(a) is essentially a recapture provision. The realities of the music business are such that many authors assign their copyrights to music publishers and record companies before the real economic value of the copyright is known. 3 Melville B. Nimmer and David Nimmer, *Nimmer on Copyright*, § 9.02, at 9-8 (1978). In other words, whether a song will be a hit or not is rarely known at the time the author is contracting with others in the industry to produce, distribute and market the song. By structuring the renewal term so that only certain enumerated persons can renew the copyright, Congress recaptured the economic benefit of those copyrights for the author and his or her heirs. *Id.*

Over the course of time between 1870 and the present and through numerous revisions to the Copyright Act, Congress

has given no indication as to how the renewal rights are to be allocated among the surviving spouse and children.[2] In 1956, the Supreme Court was presented with the issue of whether the surviving spouse and children shared jointly as a class, or whether the surviving spouse took first, leaving the children to share the renewal rights, only following the death of the spouse. *De Sylva v. Ballentine*, 351 U.S. 570 (1956) (applying the 1909 Act). In that case, the author's widow sought to exclude the author's child by another woman from claiming renewal rights, arguing that the phrase "widow, widower or children" meant that the widow took first, and the children took later only after the widow's demise. *Id.* at 573. The Supreme Court rejected this interpretation, finding instead that the phrase "widow, widower or children" created a class of persons who were entitled to share the renewal rights. *Id.* at 580. If there were no surviving members of the first class, then the next class, the author's executors, succeeded to the renewal rights, unless there was no will, at which point the last remaining class, the author's next of kin, succeeded to the rights. *Id.* at 576. The Supreme Court held that, "on the death of the author, the widow and children of the author succeed to the right of renewal *as a class,* and are each entitled to share in the renewal term of the copyright." *Id.* at 580. The court offered no guidance, however, on how those shares are to be allocated. At least two other courts have noted this dilemma, but neither had the occasion to

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[2] What the Second Circuit said in 1963 is equally applicable today to the question at hand: "This action... presents us with a picture all too familiar in copyright litigation: a legal problem vexing in its difficulty, a dearth of squarely applicable precedents, a business setting so common that the dearth of precedents seems inexplicable, and an almost complete absence of guidance from the terms of the Copyright Act." *Shapiro, Bernstein & Co., Inc. v. H. L. Green Co., Inc.*, 316 F.2d 304, 305 (2nd Cir. 1963).

address the issue directly. *See Stone v. Williams*, 970 F.2d 1043, 1066 (2d Cir. 1992) (after ruling illegitimate daughter entitled to renewal interest, court remanded issue of allocation of shares among widow, son and daughter); *Bartok v. Boosey & Hawkes, Inc.*, 523 F.2d 941, 942 n.2 (2d Cir. 1975) (appellant, composer's son, successfully argued that work was posthumous work subject to renewal and not subject to terms of composer's will; court presumed, without deciding issue, that renewal royalties would be paid "in equal shares" to widow and two sons).

The Supreme Court's holding that Sec. 304(a) creates classes of beneficiaries provides the foundation for deciding the issue presented. If the members of the class are each entitled to share in the rights created, it follows logically that the class members will share equally of that right, absent any indication from Congress of a contrary intent. RMMI argues that such a contrary intent may be found by reading Secs. 304(a) and 304(c) together. Section 304(c) provides another recapture mechanism by which the author may terminate a transfer of a copyright that is in its initial copyright term or renewal term prior to January 1, 1978 and regain the full economic benefit of the copyright. *See Nimmer on Copyright*, § 11.01. The author's termination interest may be exercised, if the author is dead, by the author's heirs as enumerated in the statute. If the author is survived by both a spouse and children or grandchildren, then the spouse owns 50% of the termination interest (§ 304(c)(2)(A)) and the children and/or grandchildren own the remaining 50% interest on a *per stirpes* basis (§ 304(c)(2)(C)). RMMI argues that this provision, created anew in the Copyright Act of 1976, indicates Congress's intent that the surviving spouse take a greater share of any recapture provision. RMMI Memorandum at 13 (Docket No. 37).

The flaw in this argument lies in a significant difference between the two recapture provisions: the termination interest can only be exercised by class members who together own a total of more than one-half of the author's termination interest. Sec. 304(c)(1). Vesting 50% of the termination interest in one of the class members gives that member leverage to effectuate a termination by needing the assent of only one more class member. In contrast, the renewal right may be exercised by any member of the renewal class; once it is exercised, the benefit enures to every class member. *See Nimmer on Copyright*, § 9.05[C][2]. This Court does not find the two provisions analogous, where Congress created the termination interest as a separate and distinct right and provided a clear mechanism for its exercise by vesting greater control in one class member. To the contrary, it begs the question that if it were Congress's intent to give the surviving spouse a greater interest in both recapture mechanisms, why did not Congress draft similar language for Sec. 304(a) when it created Sec. 304(c)? That Congress chose not to add similar language to Sec. 304(a) suggests that Congress did not consider the rights granted under the two provisions to be substantially the same.

RMMI points to no other indication of Congressional intent to allocate the renewal class members' shares other than on an equal basis. Instead, RMMI argues that the general practice in the industry is to give spouses a greater share, and that an economic disruption would occur if the Court ruled spouses are not entitled to 50% of the renewal right. RMMI Memorandum at 14-20 (Docket No. 37).[3] RMMI is asking the

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[3] RMMI also argues that such a result would eviscerate the intent of Miller's will, by which he left the entirety of his copyright estate to his widow. However, this is a policy argument that is beyond the scope of the Court's task here, which is to interpret Sec.

Court to read into Sec. 304(a) a meaning that the class members do not share equally, yet Sec. 304(a) does not say what that other allocation should be. If the Court were to accept RMMI's argument that Congress did not intend the shares to be divided equally, it would be forced to supply a term (*i.e.*, the proper allocation) that is absent from the statute. Such an approach is unwarranted here where plain logic dictates a different result.

This Court finds that, in the absence of any statutory language or evidence of Congressional intent to the contrary, Sec. 304(a) class members take in equal shares. *See Nimmer on Copyright*, § 9.04[A][1], at 9-30 ("it appears to be more logical to regard all members of the class – widow and children – alike, as equally sharing claimants"). Turner is entitled to 12.5% of the renewal copyright interests in Miller's works that are at issue in the Complaint. (Docket No. 1, Schedule 1).

RMMI also claims in its motion for summary judgment that Turner cannot recover renewal royalties prior to July 1, 1998, because such recovery is barred by the statute of limitations and/or the doctrine of laches. The issue of whether Turner is entitled to recover renewal royalties, other than those interpleaded by BMI, has not been raised by either RMMI's or Turner's motion for summary judgment. Therefore, the Court takes no position on whether Turner has a claim against RMMI for a portion of renewal royalties previously received by RMMI (and notes that Turner has not

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304(a) as drafted. In any event, Miller's intent will be thwarted no matter how this Court interprets the statute. The "will-bumping" effect of renewal rights has existed for as long as the rights themselves, and it is up to Congress, not this Court, to decide that such an effect is unfair and should be changed.

asserted any such claim against RMMI in this action) or whether that claim would be barred in whole or in part by the statute of limitations or the doctrine of laches.

The funds interpleaded by BMI are represented to be royalties collected in 2001 and 2002, well within the limitations period of three years for claims pursuant to the Copyright Act. 17 U.S.C. § 507(b). It is BMI, not RMMI, that has any obligation to pay Turner her portion of those renewal royalties it has collected to date and not dispersed, and BMI has not raised laches as an affirmative defense to making those payments. Therefore, this Court finds that neither the statute of limitations nor laches bars Turner from receiving her portion of the interpleaded funds.[4]

Turner's motion for summary judgment seeks a ruling that BMI is not entitled to deduct attorney's fees from the interpleaded funds. Turner Memorandum at 11. BMI has represented to the Court that it will not seek any attorney's fees from the interpleaded funds in connection with its responses to the motions for summary judgment and, therefore, the issue is moot. BMI Memorandum at 10 (Docket No. 44). Any other claim for attorney's fees shall be determined in accordance with Local Rule 13(e).

By May 1, 2002, the parties shall file a written notice as to any issues that remain to be decided by the Court regarding

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[4] The parties, including BMI, have represented to the Court that once the Court has determined the percentage of Turner's interest, the parties will reach an agreement as to the amount of the interpleaded funds due to Turner and RMMI, respectively. The parties are directed to file an appropriate motion by May 1, 2002 if they are unable to reach agreement.

the Complaint (Docket No. 1), cross-claim of RMMI against Turner (Docket No. 14) or otherwise.

IT IS SO ORDERED.

/s/_____
TODD J. CAMPBELL
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

NO. 3:01-0453

[Filed April 10, 2002]

BROADCAST MUSIC, INC.,	)
	)
v.	)
	)
ROGER MILLER MUSIC, INC. and SHANNON MILLER TURNER	)
	)

JUDGE CAMPBELL

ORDER

Pending before the Court is the Motion of defendant and cross-claimant Roger Miller Music, Inc. ("RMMI") for Summary Judgment (Docket No. 36), and the Cross-Motion of defendant Shannon Miller Turner ("Turner") for Summary Judgment (Docket No. 39). For the reasons set forth in the accompanying Memorandum, RMMI's Motion (Docket No. 36) is DENIED and Turner's Motion (Docket No. 39) is GRANTED.

By May 1, 2002, the parties shall file a written notice as to any issues that remain to be decided by the Court regarding the Complaint (Docket No. 1), cross-claim of RMMI against Turner (Docket No. 14) or otherwise.

IT IS SO ORDERED.

/s/_____
TODD J. CAMPBELL
UNITED STATES DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

NO. 3:01-0453

[Filed May 29, 2002]

BROADCAST MUSIC, INC.,	)
	)
v.	)
	)
ROGER MILLER MUSIC, INC. and SHANNON MILLER TURNER	)
	)

JUDGE CAMPBELL

ORDER

Pending before the Court is Defendant Roger Miller Music, Inc.'s ("RMMI") Rule 59(e) Motion to Alter or Amend Judgment (Docket No. 52). The motion is DENIED.

RMMI asks the Court to amend its judgment to find that Defendant Shannon Turner's ("Turner") claims for past royalties received by RMMI are barred by the doctrine of laches and/or the statute of limitations. In its Order entered April 10, 2002, the Court clearly indicated that it "takes no

position on whether Turner has a claim against RMMI for a portion of renewal royalties previously received by RMMI (and notes that Turner has not asserted any such claim against RMMI in this action) or whether the claim would be barred in whole or in part by the statute of limitations or the doctrine of laches" (Docket No. 49).

The Court has carefully reviewed the pleadings and RMMI's and Turner's motions for summary judgment. The defenses of statute of limitations and laches require consideration of facts that were not adequately addressed by either motion, and therefore the Court declines to amend or alter its judgment.

Because the Court has not ruled on this issue, RMMI is free to file a summary judgment motion with supporting affidavits and a statement of undisputed facts that lay out the facts regarding Turner's claims against RMMI. Any such motion shall be filed by July 1, 2002.

IT IS SO ORDERED.

/s/ _____
TODD J. CAMPBELL
UNITED STATES DISTRICT JUDGE

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

Case No. 3:01-00453

[May 6, 2005]

BROADCAST MUSIC, INC.,	)
	)
v.	)
	)
ROGER MILLER MUSIC, INC. and SHANNON MILLER TURNER	)
	)

BEFORE THE HONORABLE TODD J. CAMPBELL, DISTRICT JUDGE

TRANSCRIPT OF PROCEEDINGS

[p.2]

The above-styled cause came on to be heard on May 6, 2005, before the Honorable Todd J. Campbell, District Judge, when the following proceedings were had, to-wit:

THE COURT: We are here to take up the case of Broadcast Music, Incorporated versus Roger Miller Music

and Shannon Miller Turner. The case is on remand for proceedings consistent with the opinion of the Sixth Circuit. And it would appear to me that the only thing left to do is distribute the money, but I wanted to see the parties' views of that. I will hear from each of you. I will start with Roger Miller Music.

MR. THOMPSON: Good afternoon, Judge Campbell.

THE COURT: Good afternoon.

MR. THOMPSON: May it please the Court, with respect to any distribution of interpleaded funds, Your Honor, there aren't any. It's all been accomplished by agreement amongst the parties. If you have the docket of the case before you, there was an agreed order entered, Docket Number 64 on 8-12-02, which released all of the interpleaded funds, and there have been no additional funds paid into the court because by agreement amongst the parties, including BMI and so forth, direct distribution has been made to Ms. Turner since then. And the motion just filed by BMI indicates --

THE COURT: What motion just filed? I don't have a motion.

[p.3]

MR. THOMPSON: Motion to be excused from attendance.

THE COURT: Oh, that motion. Yes.

MR. THOMPSON: It contains the financial information with respect to any funds which are presently being held by BMI pursuant to contract. So unless Mr. Bowen disagrees,

which I don't think he does, there is nothing left of the case upon which the Court needs to act.

THE COURT: Okay.

MR. BOWEN: BMI is here too, Your Honor. Mr. Newsom is here in any event.

THE COURT: Is there an attachment to this motion?

MR. NEWSOM: No, Your Honor. I think what Mr. Thompson is referring to is the statement in the motion that Broadcast Music presently has on hand the sum of $34,698.97 representing a 5.36 percent interest in the applicable royalties which are at issue, were at issue and appealed to the Sixth Circuit. So that was the amount of money that could have swung one way or another depending on which of the parties prevailed in the Sixth Circuit. And we if the Court so directs, as this motion says, Broadcast Music is willing to credit the funds on hand to Mary Arnold Miller and to distribute them to Broadcast Music, Incorporated. I think that's the intention of the Sixth Circuit's ruling.

[p.4]

THE COURT: Well, I am not sure I agree with that. It seems to be there is an agreement that all the funds that were originally interpled into the court have been distributed and that the court is not holding anything else, correct?

MR. THOMPSON: Yes, sir.

MR. BOWEN: Correct, Your Honor.

THE COURT: There is a long and tortured history of the parties arguing about what was actually pled and what summary judgment was requested on and whether the statute of limitations had run on certain things that hadn't been pled. So I am not sure I have got authority to start ordering distributions of money that haven't been paid into the Court.

MR. BOWEN: Perhaps I can help. I will try.

THE COURT: Okay. If you guys have worked out agreement about all this, then all that is moot. I don't want to start ordering things that aren't really pending before the Court.

MR. BOWEN: I think I can put us in context and resolve those issues. I will try anyway.

First, I might observe that even armed with Your Honor's opinion and all the other authority on our side, nevertheless I wasn't successful in the Sixth Circuit in persuading them that our position below was correct.

THE COURT: One-third of them agreed.

[p.5]

MR. BOWEN: Well, we know that. I ran into Judge Daughtrey at the bank, and she was having some disagreement with the tellers actually at First American Centennial Park about whether or not there was an AmSouth ATM machine at the airport. And two of the tellers were telling her there was, and the third said there wasn't. And I said -- it was just after this opinion had come out. And I said, "Judge, it looks like you have persuaded one of them, but you lost two to one." She, I think, got a tickle out of that.

We are in the process of filing a petition for cert. It is due at the end of June.

THE COURT: How can you do that with the mandate being returned here?

MR. BOWEN: That's what we were just discussing.

THE COURT: The only reason I acted is I got the mandate.

MR. BOWEN: We know.

THE COURT: I was actually surprised that the mandate had been returned.

MR. BOWEN: We know. But nevertheless, procedurally, as far as I am aware, there is nothing pending here. There is no money on hold because anything that had been paid in was paid in at the lower rate.

You may recall we moved for summary judgment to get those funds out because they were paid at the lower rate [p.6] so even if we were wrong, there was nothing to have interpled.

THE COURT: I had forgotten about the agreed order while the case was -- I think it was while on appeal to disburse the interpleaded funds.

MR. BOWEN: Yes, sir.

THE COURT: I had forgotten that.

MR. BOWEN: And that's because this litigation wouldn't have any effect on -- or the appeal would have no effect because it was paid in at the lower rate. So now the parties have agreed that -- and with the Court having entered that order -- that the funds would be paid directly to Ms. Turner, Ms. Miller Turner. And that in effect there is nothing to interplead.

What is -- I think what is on account at BMI is the money that was accrued until the next royalty check is paid.

MR. NEWSOM: That's correct.

MR. BOWEN: So that's the amount that's set forth in BMI's recent motion. But that money will flow through whether it is at the lower rate or the higher right. Right now it would be at the lower rate unless the Supreme Court does something about that. If that helps.

THE COURT: Hold on just a second.

Well, now I can see why I apparently forgot that [p.7] there was the agreed order. The Sixth Circuit says this case is remanded for the distribution of the interpleaded funds.

MR. BOWEN: Right.

MR. THOMPSON: Right.

MR. BOWEN: So that's happened. So I would assume the mandate -- I guess we'll have to look, but I guess the mandate is limited. I don't know. If there is such an animal, we need to look.

THE COURT: All right. Let me cut through all the confusion. As I understand it, everybody agrees that there is nothing left for this Court to do and that everything that can be done has been done and whatever occurs between the parties or on further appeal are matters that aren't presently needing to be determined here.

MR. BOWEN: Correct.

THE COURT: Everybody in agreement?

MR. THOMPSON: We're all in agreement, Your Honor, yes, sir.

MR. NEWSOM: Yes, sir.

THE COURT: Okay.

MR. THOMPSON: As a matter of fact, if I might add one point, I think that clearly by the record in the case the mandate has been satisfied by virtue of the agreed order which I mentioned earlier from 2002. No money ever was paid into the court subsequent to the agreement amongst the [p.8] parties where we wanted Ms. Turner to get 7.14 percent of the royalties pending the outcome of the case.

MR. BOWEN: That's not an agreement of the parties. That's the Court's order.

MR. THOMPSON: Well, it is agreed order.

THE COURT: But the bottom line is there is nothing for the Court to distribute, and there is nothing else pending here. And as far as I am concerned, I can close the case unless, Mr.

Bowen, you can get the U.S. Supreme Court to take it and do something with it, that's the end of the matter.

MR. BOWEN: While it was on appeal, the Copyright Office issued an opinion that was also consistent with our position and Your Honor's, and that didn't help us any either. So it is pretty interesting to see all the authorities.

THE COURT: This is a fascinating case. I commend each of you for bringing it and seeking a resolution that's civil among the parties, and it is extremely important to all of the holders of copyrights. And whatever the result, there will ultimately be finality, and I think it is -- I am glad you brought it, and I think you are each to be commended on the briefs you filed and arguments you made. And there are always going to be winners and losers, but I think it is extremely important and novel, and, frankly, it is shocking [p.9] that it's taken so many years for it to be brought and resolved. I guess you could argue that since 1909 or some similar time that this has been out there to be decided You are all to be commended for it. I think it is an extremely important issue, particularly here in the Nashville area where so many estates are probated. And I suspect there are a number of individuals shocked and amazed that essentially federal copyright law preempts their intent.

MR. BOWEN: Really interesting.

THE COURT: It is fascinating and very important. So all of you are to be commended. I suspect this is the end of the matter, but of course Mr. Bowen thinks it may not be.

MR. BOWEN: I don't make any prediction. We're going to try though. Mr. Thompson and I have a related issue actually in Judge Haynes' court. It is not related necessarily,

but it has to do with again the Roger Miller Music copyrights, Roger Miller's copyrights. Mr. Thompson represents Roger Miller Music again, and his contention is that in part because of the automatic renewal -- the renewal copyright operation cuts off my client, Sony Music's, renewal of rights that accrued with respect to ownership of the renewals. I didn't phrase it very well. But Miller allegedly assigned his renewal interests in a number of famous songs in his songwriting agreement with Sony Music. Mr. Thompson contends that because of the renewal, automatic [p.10] passage of the renewal rights of the heirs, whoever they might be, that it's cut off Sony's rights. So it is a pretty interesting issue that we have got on summary judgment in Judge Haynes' court. It is interesting to see how these statutes --

THE COURT: Mr. Thompson, was there something you'd like to say?

MR. THOMPSON: I'd like to first of all thank you for the compliment.

THE COURT: You are welcome. You each deserve it.

MR. THOMPSON: I wanted to add that I found out only this morning that the decision is the subject of an article in the *New York Law Journal* to be published next week. A lawyer by the name of Tom Levy who supplied Mr. Bowen with the letter from the Copyright Office is taking one side of the issue, needless to say, and then there is another side presented. But it has been hanging out there essentially since 1956, and it has affected enormous numbers of successful people. So it is for me I think it's especially important that it happened in Nashville and it happened in the Sixth Circuit.

THE COURT: Well, I guess that explains why I couldn't remember the copyright letter as part of our statute.

MR. THOMPSON: It wasn't part of the record.

[p.11]

MR. BOWEN: Between the decision.

THE COURT: Since 1956 is plenty old enough -- I was born in 1956 and all the aches and pains so that's plenty of time. Anything BMI wants to say? Thank you for being here.

MR. NEWSOM: Thank you, Your Honor. Thank you for the Court's consideration in allowing us not to attend, but we -- I guess curiosity got the better of us, and we decided to come.

THE COURT: Well, these cases aren't -- interpleader actions aren't always this civil. Strange things happen if you don't show up.

MR. NEWSOM: I agree.

THE COURT: I could tell you a story about me and Avon Williams where I interpleaded funds. It went on for a long time. I just wanted to make sure that you realized that something bad could happen to you.

MR. NEWSOM: I thank you. We've got a chancellor in Memphis who says, "Be careful what you ask for; you might get it." So that seemed to be a possibility here. But Broadcast Music did not participate in the appeal of the Sixth Circuit. And as we understand from Mr. Bowen an appeal or an application for cert to the United States Supreme Court may

be in the offing. I suppose I can gather from that that these funds that we presently have on hand had better stay [p.12] put until we're certain of the outcome of that petition, Your Honor. So I know the Court does not have that matter before it right now, but I think that the parties understand our position.

MR. THOMPSON: I have no objection whatsoever to you continuing to hold the funds. It is all decided by contracts ultimately anyway.

MR. NEWSOM: We concur. Thank you, Your Honor.

THE COURT: All right. You are welcome. Again, I commend the parties. I think it is an important case to bring. And for what it is worth, Mr. Bowen, I am batting a thousand in the Supreme Court.

MR. BOWEN: Well, I am glad this is on the record. I will provide that in support of our cert application.

[p.13]

REPORTER' S CERTIFICATE

I, Cathy B. Leigh, Official Court Reporter for the United States District Court for the Middle District of Tennessee, with offices at Nashville, do hereby certify:

That I reported on the Stenograph machine the proceedings held in open court on May 6, 2005, in the matter of BROADCAST MUSIC, INC., vs. ROGER MILLER MUSIC, INC. and SHANNON MILLER TURNER, Case No. 3:01-00453; that said proceedings in connection with the hearing were reduced to typewritten form by me; and that the

foregoing transcript (pages 1 through 12) is a true and accurate record of said proceedings.

This the 12th day of May, 2005.

/s/_____

Cathy B. Leigh, RDR, CRR
Official Court Reporter

APPENDIX G

The Register of Copyrights
of the
United States of America

Library of Congress
Department 17
Washington, D.C. 20540 (202) 707-8350

September 11, 2003

Dear Mr. Berman:

I am pleased to respond to your letter requesting the Copyright Office's opinion regarding the advisability of legislation clarifying the division of interests between an author's surviving spouse and children in whom the renewal term of a copyright has vested. Based on the rationale set forth below and the fact that copyrighted works will continue to enter their renewal terms – a vestige of the Copyright Act of 1909– only for another 2½ years, I do not believe such legislation would be advisable.

As you point out, the division of interests in a work among an author's surviving spouse and children under the renewal provisions of 17 U.S.C. § 304(a) may differ from the division of the termination interest for the same categories of beneficiaries under the provisions of 17 U.S.C. § 304(c). You have asked whether either the Copyright Act or the relevant case law provides a definitive answer as to the division of the renewal interest between a surviving spouse and children of

the author under § 304(a). The short answer is that they do not provide a definitive answer, but a plain reading of § 304(a)(1)(C)(ii), coupled with a review of the scant case law and commentary, suggests that the proper interpretation is that there is a proportional division of renewal rights under § 304(a).

The Renewal Interest (§ 304(a)(1)(C)(ii))

Section § 304(a)(1)(C)(ii) provides that if the author is not living at the time of renewal, the renewal term copyright shall belong to the "widow, widower, or children of the author."[1] I believe that the plain meaning of this section is that when the author is dead and there are both a surviving spouse and children, the spouse and children share in the renewal right on a per capita basis, i.e., each individual has an equal share. If there are a spouse and two children, each gets a ½ share. While that is not the only plausible reading, it is the most reasonable reading of the plain language of § 304(a)(l)(C)(ii).[2]

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[1] This rule does not apply to works made for hire or to posthumous works and periodical, cyclopedic or other composite works for which the copyright was originally secured by the proprietor. See 17 U.S.C. § 304(a)(1)(B).

[2] As discussed below, § 304(a)(l)(C)(ii) was intended to be a recodification of the renewal provisions of the 1909 Copyright Act. The legislative history reveals that the drafters of section 304 were aware that in enacting this provision, they were "perpetuating the complexities, uncertainties, and ambiguities" of the existing renewal provision." See discussion below (quoting Copyright Law Revision, Part 6, Supplementary Report of the Register of Copyright on the General Revision of the U.S. Copyright Law; 1965 Revision Bill, at 94 (1965)). See also H.R. Rep. No. 94-1476, at 141 (1976) ("It is not clear how the shares of a class of renewal beneficiaries are to be divided under the existing law").

Nimmer also favors *a per capita* interpretation of the division under § 304(a). M. Nimmer & D. Nimmer, 3 Nimmer on Copyright § 9.04[A][1] (2003). His rationale is based on the logic of the language that specifies "widow, widower or children." He reasons that similar language dividing ownership interests between "sons or daughters," would not be divided on a *per stirpes* basis. For example, in a situation where there was only one surviving son and two daughters, the single son would not get fifty percent with the two daughters sharing the remaining fifty percent equally among themselves.

We have not found any cases in which a court has actually decided the issue of how the renewal interest is apportioned among surviving spouses and children. However, in at least one case, in *dicta*, the United States Court of Appeals for the Second Circuit seemed to interpret § 304(a) to mean that a surviving spouse and any children share equally in the renewal interest. Bartok v. Boosey & Hawkes, Inc., 523 F.2d 941, n.2- and 949 (2nd Circ. 1975). This is consistent with what I have already described as the most reasonable reading of § 304(a)(l)(C)(ii).

I can find no reason to conclude that § 304(a)(1)(C)(ii) should be read as providing for a *per stirpes* division of the renewal interest.[3] However, § 304(c) does provide that

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[3] Alternatively, it is possible that this is a question of state law. In a case construing the renewal provision (§ 24) of the Copyright Act of 1909, the Court addressed the definition of "children," stating, "This is really a question of the descent of property, and we think the controlling question under state law should be whether the child would be an heir of the author." DeSylva v. Ballentine, 351 U.S. 570, 582 (1956). It is conceivable that for the same reasons that the Court looked to state law to determine the meaning of

interests in the termination right are divided on *a per stirpes* basis. On the face of it, there may appear to be a tension between the two provisions.

The Termination Interest (§ 304)(c)(2)(A))

It appears that the *per stirpes* rule in § 304(c) may have been designed to give the widow or widower a decisive voice about whether to terminate. Although it is necessary to look to the legislative history of § 203, a related termination provision, to find a rationale for the decision to establish a *per*

"children" in the renewal provision, the Court would also look to stale law to determine the respective interests of surviving spouses and children under the same provision. However, DeSylva itself appears to have rejected such an approach. Before addressing the issue of who is a "child" of an author, the court interpreted § 24 to determine whether the surviving spouse and children succeed to the renewal interest as a class or, alternatively, whether the children succeed to the renewal interest only if the spouse is no longer alive. The court did not look to state law to determine the answer to this question, but simply construed the language of the statute as a matter of federal law (relying heavily on the legislative history of the renewal provisions in successive copyright statutes). And in explaining why it looked to state law for a definition of "children," the Court observed that "[t]he scope of a federal right is, of course, a federal question, but that does not mean that its content is not to be determined by state, rather than federal law." 351 U.S. at 580. Because there is no federal law of domestic relations, and because state law provided a "ready-made body" of law to answer the question of who is a "child" of the deceased, the Court looked to state law for the definition. But the fact that the Court looked to state law to provide "content," or a definition, to a term in the federal statutory provision does not mean (and in DeSylva did not mean) that the Court would look to state law to define the scope of the federal right. See *id.*

stirpes division for terminations, the same considerations were applicable to the decision to establish a *per stirpes* rule for § 304(c). H.R. Rep. No. 94-1476, at 141 (1976). See Copyright Law Revision, Part 6, Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1965 Revision Bill, at 95 (1965).

Some of the witnesses who testified before Congress during the copyright revision process raised concerns about how the division of termination rights under § 203 would function. See Copyright Law Revision: Hearings before Subcomm. No. 3 of the House Comm. On the Judiciary, 89th Cong. 94 and 1816, 1st Sess. 1966), (Testimony of Rex Stout, President, Authors League of America and Prof. Melville B. Nimmer). One of the early legislative proposals would have required that the § 203 termination right be exercised by unanimous consent of the surviving spouse and children. H.R. Rep. No. 89-2237, at 120 (1966). Motion picture studios and publishers were pleased with that approach because that made it difficult to exercise the termination right, *Id.* at 121. Authors' representatives understandably objected to that requirement as unfair and unworkable, and succeeded in persuading Congress to adopt the *per stirpes* rule. *Id.* After rejecting an approach requiring unanimity, the House Committee report states, "Of the remaining three alternatives – allowing one member of the group to bind all the others, allowing unlimited fragmentation, or requiring majority action – the third seems distinctly preferable." *Id.*

Under the *per stirpes* rule, a widow or widower who does not wish to terminate cannot be overruled by the author's children, no matter how many children there are. If termination were governed by a *per capita* rule, the children could overrule the surviving spouse in a situation where there is more than one child. The rationale, albeit not stated in the

legislative history, appears to be that if a surviving spouse is satisfied with the existing agreements and the income that is being derived from those agreements, he or she should not be required to abandon them simply because the children disagree. As the committee report written at the time the per stirpes rule was adopted states, "since she owns 50 percent, the widow is an essential party." H.R. Pep. No. 89-2237, at 121 (1966). In other words, the surviving spouse in effect has a right to veto any termination.

The Inconsistency between the Division of Renewal Interests and the Division of Termination Interests

If the *per stirpes* rule of § 304(c)(2)(A) was in fact intended to protect the surviving spouse, that rationale may explain the inconsistency between § 304(a)(1)(C)(ii) and § 304(c)(2)(A). Section 304(a) provides that the interest in the renewal term is shared *per capita* because it addresses only who owns the rights at renewal, and what share of those rights they own. Section 304(c) addresses termination, and the *per stirpes* rule is designed to give the majority, which must include the surviving spouse, control over whether there will be a termination. It also affects the division of the interest, but that seems to have been of secondary importance compared to the power to terminate which is at the heart of the decision to make § 304(c) a *per stirpes* rule.

While (as the legislative history suggests) § 304(a)(1)(C)(ii) may not be a model of clarity, Congress made clear that in deciding how to divide the renewal interest, it did not want to disrupt the "present expectancies" (even if it was unclear what those expectancies were). H.R Rep. No. 94-1476, at 141; S. Rep. No. 94-473, at 124. Both the House and Senate reports for the Copyright Act of 1976 state that:

> Subsection (a) of section 304 reenacts and preserves the renewal provision, now in section 24 of the statute, for all of the works presently in their first 28-year term. A great many of the present expectancies in these cases are the subject of existing contracts, and it would be unfair and immensely confusing to cut offer alter these interests.

H.R. Rep. No. 94-1476, at 139; S. Rep. No. 94-473, at 122. The House reports in 1966 and 1967, when the relevant language was decided upon, have similar language. H.R. Rep. No. 892237, at 136 (1966). H.R. Rep. No. 90-83, at 107 (1967).

Similar concerns were expressed by the Register of Copyrights as this issue was being considered, The Register's 1961 report stated:

> Certain persons will have acquired expectancies of the future renewal rights under the present law--expectancies that might accrue to them when the time for renewal arrives, depending upon who is living at that time. Substantial sums have been invested in some of these expectancies. To apply the new law would deprive potential claimants and their assignees of their expectancies in many cases.
>
> Consequently, we believe that the present provisions as to who may renew should remain in effect for preexisting copyrights in their first term. It is unfortunate that the highly troublesome provisions for the reversion of renewal rights should continue in

> effect for 28 years longer, but we believe this is preferable to the confusion and unfairness that would result if existing renewal expectancies were cut off.

Copyright Law Revision: Report of the Register of Copyright on the General Revision of the, U.S. Copyright Law, at 57 (1961).

Later, again after emphasizing the inadequacies of the language of §§ 24 and 25, the Register's 1965 report reiterated that it should be retained without change:

> As pointed out in the 1961 *Report,* works in their first term are now subject to specific renewal expectancies, many of which have been bargained for and sold. We believe it would be unjust to destroy these expectancies, whether transferred or not, and section 304(a) therefore follows the *Report's* recommendation that the present renewal provision be preserved for these works.
>
> Although this means perpetuating the complexities, uncertainties, and ambiguities of the renewal section for another 28 years, there has been general acceptance and support for this proposal. Most people have recognized that any attempt to improve the language now in effect would compound the present confusion, and that it would be better to retain the present language which at least has a background of many years of interpretation and practice.

Copyright Law Revision, Part 6, Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1965 Revision Bill, at 94 (1965).

Although the legislative history does not directly address the fact that the division of renewal interests among the spouse and children differs from the division of the termination interest, it seems clear that in each case Congress intended a different result. Although, as discussed above, there is some ambiguity in the language of § 304(a)(1)(C)(ii) governing division of the renewal interest, it is difficult to read the statutory language or the legislative history to indicate that a *per stirpes* division was intended. On the other hand, it is clear that Congress did intend a *per stirpes* division of the termination interest under § 304(c)(2)(A). Although it would have been helpful if Congress had attempted to reconcile the differences between the two approaches, the fact remains that a conscious decision was made to address each situation differently.

Conclusion

I agree with the judgment of Congress years ago that to change § 304(a)(l)(C)(ii) to provide for *per stirpes* division of the renewal interest would disrupt existing expectations. Although, as noted above, § 304(a)(l)(C)(ii) is not a model of clarity, and although it is susceptible of more than one interpretation, the most reasonable reading is that it provides for *per capita* division. In any event, it is clear that to read the current language as providing for a *per stirpes* division would be a very strained reading. Enacting a law amending § 304(a)(1)(C)(ii) to provide for *per stirpes* division of the renewal interest would interfere with current and past expectancies and presumably disrupt the estate planning of many authors.

Moreover, we are almost at the end of the era of copyright renewal. Works copyrighted in 1977 were the last to come under the renewal system of copyright (usually through publication with notice). The renewal terms for these works will commence on January 1, 2006, the last date on which any first-term copyrights will enter their renewal term. Any change in the provision in § 304(a)(1)(C)(ii) allocating the renewal term interest among the surviving spouse and children will, as a practical matter, affect only those works that will enter the renewal term between now and January 1, 2006, less than 2½ years from now. Based on the legislative history, I would be reluctant to second-guess the judgment Congress made when it enacted the 1976 Act. In any event, enacting an amendment to § 304(a) now necessarily could be prospective only, and the effect would be to change the rules only with respect to the relatively few renewals that will ever occur again. In other words, it makes no sense to change the rules at the end of the game. Certainly, if such an amendment were anticipated, it would require a factfinding exercise to determine what are the actual practices and expectations among authors and their spouses and children, in order to determine how disruptive such a change might be. Given the time necessary to engage in such factfinding, coupled with the imminence of the demise of the era of renewals, it would not appear to be advisable at this time to consider such an amendment.

Sincerely yours,

/s/

Marybeth Peters
Register of Copyrights

The Honorable Howard L. Berman
U.S. House of Representatives
Room 2221
Rayburn House Office Bldg.
Washington, D.C. 20515

APPENDIX H

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Intellectual Property

Alan J. Hartnick
New York Law Journal
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The year 2005 is the last year in which certain subsisting copyrights in the first term of copyright of 28 years can apply for or obtain a renewal of 67 years.

But renewal problems will be with us for a long time. If the author is dead at renewal time, "the widow, widower, or children of the author,"[1] are entitled to the renewal. This language has been in the Copyright Law since 1870.

If there are three children and a widow, is the share 25 percent for each ("equal share[]") or 50 percent for the widow and 16.666 percent for each of the children ("disproportionate shares").[2]

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[1] 17 USC § 304(1)(c)(ii). The same provision is in § 24 of the Copyright Act of 1909.

[2] The legislative history reveals that the drafters of § 304 were aware that in enacting this provision, they were "perpetuating the complexities, uncertainties, and ambiguities" of the existing renewal provision." See Copyright Law Revision, Part 6,

In the absence of a contract, the appropriate share is important for performing rights and many other exploitations of copyrighted works. Trade custom was 50 percent to the widow and 50 percent to the children. But there were no cases until 2002, and that particular unpublished case was unknown to many in the copyright bar.

Is it not strange that there were no cases at all between 1870 and 2002?

The Register of Copyright's View – 2003

U.S. Representative Howard L. Berman, D-Calif., asked the opinion of the Register of Copyrights, Marybeth Peters, regarding the advisability of legislation clarifying the division between an author's surviving spouse and children in whom the renewal term has vested. Should it be equal shares or disproportionate shares?

On Sept. 11, 2003, Ms. Peters wrote back that:

The short answer is that they [the Copyright Act and relevant case law] do not provide a definitive answer, but a plain reading of § 304(a)(1)(C)(ii), coupled with a review of the scant case law and commentary, suggests that the proper interpretation is that there is a proportional division of renewal rights under § 304(a) . . . .

Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1965 Revision Bill, at 94 (1965)). See also H.R. Rep. No. 94-1476, p. 2 at 141 (1976) ("It is not clear how the shares of a class of renewal beneficiaries are to be divided under the existing law").

We have not found any cases in which a court has actually decided the issue of how the renewal interest is apportioned among surviving spouses and children . . .

I agree with the judgment of Congress years ago that to change § 304(a)(1)(C)(ii) to provide for per stirpes division of the renewal interest would disrupt existing expectations. Although, as noted above, § 304(a)(1)(C)(ii) is not a model of clarity, and although it is susceptible of more than one interpretation, the most reasonable reading is that it provides for per capita division. In any event, it is clear that to read the current language as providing for a per stirpes division would be a very strained reading. Enacting a law amending § 304(a)(1)(C)(ii) to provide for per stirpes division of the renewal interest would interfere with current and past expectancies and presumably disrupt the estate planning of many authors.

'Venegas-Hernandez'– 2003

The Chief Judge of the District Court of the District of Puerto Rico, Judge Jose A. Fuste, in *Venegas-Hernandez v. Peer*,[3] decided on a per capita allocation. He reasoned:

> More importantly, perhaps, are the statutory notes attached to Section 304, which state that '[i]t is not clear how the shares of a class of renewal beneficiaries are to be divided under the existing law . . . ,' thus implicitly refusing to adopt the questionably analogous termination provisions within Section 304(c)(2) . . . .

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[3] 283 FSupp2d 491 (D. Puerto Rico 2003), on appeal to the First Circuit.

As stated in Nimmer,

> 'On the whole, then, it seems better to look only to the 'four corners' of the Copyright Act in determining such division. Because the Act fails to indicate any internal division for what has been established as a single class, it appears to be more logical to regard all members of the class – widow and children – alike, as equally sharing claimants. Suppose the Act, instead of referring to 'children' had conferred renewal rights upon the author's 'sons and daughters.' If an author left one son and two daughters, it would be odd to conclude that the son's share is equal to the combined share of both daughters. If in such circumstances each son and each daughter would be regarded as entitled to a share equal to those of each other member of the single class of 'sons and daughters,' given that widow and children are also members of a single class, they too should, as individuals, each have an equal share. [Nimmer] at § 9.04[A][1].'

We, therefore, choose to apply an equitable distribution across the class.

The Sixth Circuit – 2005

In 2002, Judge Todd J. Campbell of the U.S. District Court for the Middle District of Tennessee, Nashville Division, in an unpublished opinion, held that there was per capita distribution. This opinion was reversed, 2 to 1, by the U.S. Court of Appeals for the Sixth Circuit in 2005 in *Broadcast Music, Inc. v. Roger Miller Music, Inc.*[4]

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[4] 396 F3d 762 (6th Cir. 2005), cert. denied, April 1, 2005.

Judge Julia Smith Gibbons wrote:

> If we interpreted § 304(a) as providing for equal shares, the shares eventually held by a widow and her children would ultimately rest upon whether the author assigned copyright interests that vested prior to his death, or, instead, never assigned such interests or assigned interests that vested only after his death. In the case of the former, a surviving spouse would hold a 50-percent interest in the event of the termination of that transferred renewal interest and the author's surviving children would share the remaining 50-percent equally. In the case of the latter, all parties would share equally upon renewal of the copyright. No statutory language suggests why such result should occur. In addition, no logic readily comes to mind to support disparate results under these two scenarios. Insofar as an equal shares interpretation would produce absurd results, it should be avoided . . .
>
> Congress has clearly indicated that, whenever grants of renewal interests are terminated, such interests will vest in disproportionate shares between a deceased author's surviving spouse and children. See 17 USC §§ 203 & 304(c). A deduction, absent contrary statutory authority, that such interests should vest any differently upon creation would be unfounded and illogical.

In dissent, Judge Martha Craig Daughtrey, wrote:

> Congress certainly knew how to create a disproportional distribution scheme, as evidenced by the provisions in § 304(c). That it did not employ

> similar language in § 304(a) can only mean that it did not intend that section to mandate disproportionality.

Judge Daughtrey also pointed to the U.S. Supreme Court's opinion in *DeSylva v. Ballentine,* 351 US 570 (1956), in which the Court held that the phrase "widow, widower or children" found in § 24 of the Copyright Act of 1909 created a class of persons who "succeed to the right of renewal as a class, and are *each* entitled to share in the renewal of the copyright."[emphasis supplied]

Judge Daughtrey concluded by noting:

> The length and the complexity of the majority opinion indicate how much strain is required to fabricate a distribution system that simply does not exist in the statute. Rather than engage in what seems to me to constitute a clear case of judicial activism, I respectfully dissent.

Views of Music Lawyers

I asked two respected music lawyers, Edward M. Cramer, now representing various estates and formerly president of BMI, a performing rights organization, and Thomas C. Levy of The Levy Firm, for their views.

Mr. Cramer stated:

> It has long been the practice to recognize a widow's or widower's right to 50 percent of the renewal interest with the balance to be divided among the children. The lower courts decisions had the possibility of opening up deals that, in good faith, followed this practice. There are questions under the old law (1909)

that one would think had long sine been resolved but are still open.

Mr. Levy stated:

> The problem of the division of renewal copyrights among the class of widow and children has vexed practitioners in the field of copyright law for many years. It seems astonishing that a legal issue which is of such long standing and is so pervasive, particularly, in the area of musical copyrights, has never been decided in spite of all invitations to the courts to do so.
>
> Because of the uncertainty of the statutory meaning, practitioners have been constrained to find compromises suitable to their clients' needs and desires in specific situations, often influenced by the client's economic power and by the value of the copyright(s) at issue. Such situations are common. I cannot remember a time when there was not at least one of my clients affected by the problem, either in the context of a family dispute of the type that brought the *Roger Miller* case to the courts or in the context of a dispute between publishers who could not be certain as to the percentage of a copyright which they might have been assigned by an author's widow or by one or more of an author's children.

Conclusion

Venegas-Hernandez is on appeal to the U.S. Court of Appeals for the First Circuit. It is not clear if the First Circuit will rule on the statutory language discussed in this article. For clarity, it would be my hope, if they do so, that the First Circuit

would follow the U.S. Court of Appeals for the Sixth Circuit. It is difficult to discern Congress' intent between the statutory language from 1870 on and the 1976 termination provisions calling for disproportionate shares. We are dealing with Congresses generations apart. Nonetheless, in my view, a reasoned selection between two possible interpretations, between "equal shares" or "disproportionate shares," will provide consistency.

Alan J. Hartnick *is a partner of Abelman, Frayne & Schwab and an adjunct professor of law at Fordham Law School.*